


## Wochnick, Heather M CIV USN (US)

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**From:** Callaway, Rex CIV NAVFAC SW  
**Sent:** Wednesday, September 09, 2009 6:59  
**To:** Gilkey, Douglas E CIV OASN (I&E) BRAC PMO West; Macchiarella, Thomas L CIV OASN (I&E) BRAC PMO West; Forman, Keith S CIV OASN (I&E) BRAC PMO West; Kito, Melanie R CIV NAVFAC SW  
**Cc:** Cummins, John M CIV NAVFAC SW; Liotta, Rita M CIV WEST Counsel  
**Subject:** FW: SFRA Revised Early Transfer Cooperative Agreement Dated 9/8/2009 Covering Portions of Hunters Point Naval Shipyard  
**Attachments:** SFRA ETCA 9 8 09(1).doc; SFRA COVER LETTER DATED 9 8 09.doc; Redline.doc; Agreement to Implement the Conveyance Agreement Regarding IR Sites 7, 18.doc; DeltaView Comparison from SFRA ETCA 9 8 09.rtf

Doug, etc.

I found this in my inbox this morning. It is quite a package. (b) (5)



-Rex

(b) (5)



-----Original Message-----

**From:** Schlossberg, George R. [mailto:George.Schlossberg@KutakRock.com]  
**Sent:** Tuesday, September 08, 2009 21:10  
**To:** Callaway, Rex CIV NAVFAC SW; Cummins, John M CIV NAVFAC SW; Liotta, Rita M CIV WEST Counsel  
**Cc:** Elaine Warren; 'Celena Chen'; Tiffany Bohee; Thor Kaslofsky; Amy.Brownell@sfdph.org; gordonhart@paulhastings.com; Michael Cohen; 'james.morales@sfgov.org'; Schlossberg, George R.; Steinberg, Barry P.  
**Subject:** SFRA Revised Early Transfer Cooperative Agreement Dated 9/8/2009 Covering Portions of Hunters Point Naval Shipyard

John, Rex, Rita:

On behalf of the San Francisco Redevelopment Agency ("SFRA"), I am forwarding for your review and comment:

1. a revised draft Early Transfer Cooperative Agreement dated 9/8/2009 ("SFRA 9/8 ETCA"), together with a "red-line" version of the document that reflects changes to the Navy draft ETCA dated 2/5/2009 ("Navy 2/5 ETCA") that was the basis of our meeting;
2. a revised draft Administrative Order on Consent ("AOC") dated 9/8/2009 ("SFRA 9/8 AOC"), together with a "red-line" version of the document that reflects changes to the original 4/6/2009 version ("4/6 AOC"); and
3. a draft Agreement to Implement the Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point Naval Shipyard with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140 dated \_\_\_\_\_ ("IR Sites 7/18 Agreement").

The SFRA 9/8/ ETCA (i) reflects changes agreed to at our meeting (e.g. add back AOC, incorporate escrow concept, etc.), (ii) deletes IR sites 7/18 from the body of the ETCA, but addresses IR sites 7/8 through the IR Sites 7/18 Agreement attached as an Appendix to the ETCA, and (iii) has been conformed with the SFRA 9/8 AOC.

Please note that the SFRA 9/8 ETCA, SFRA 9/8 AOC and IR Sites 7/18 Agreement have been discussed with the contract developer for the property and the three (3) documents contain the consolidated comments of the SFRA and the developer.

Please distribute the SFRA 9/8 ETCA, SFRA 9/8 AOC and IR Sites 7/18 Agreement as appropriate among the Navy team so we can jointly determine how best to proceed. If you have any questions or concerns, please call me directly at 202-828-2418 or contact me by email at [george.schlossberg@kutakrock.com](mailto:george.schlossberg@kutakrock.com)<<mailto:george.schlossberg@kutakrock.com>>.

Thanks. George  
George R. Schlossberg  
Kutak Rock LLP  
1101 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202-828-2418  
Facsimile: 202-828-2488  
[george.schlossberg@kutakrock.com](mailto:george.schlossberg@kutakrock.com)  
[www.kutakrock.com](http://www.kutakrock.com)

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**EARLY TRANSFER COOPERATIVE AGREEMENT**

**COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD**

**BETWEEN**

**THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY**

**AND**

**THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA**

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
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SAN FRANCISCO, CALIFORNIA  
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# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

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\_\_\_\_\_.

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
AGREEMENT**

**EARLY TRANSFER COOPERATIVE AGREEMENT  
COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD  
BETWEEN  
THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY  
A N D  
THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA**

1       **THIS EARLY TRANSFER COOPERATIVE AGREEMENT** ("Agreement") is  
2 made by and between the **UNITED STATES OF AMERICA**, acting by and through Naval  
3 Facilities Engineering Command ("Navy") and the **SAN FRANCISCO REDEVELOPMENT**  
4 **AGENCY**, San Francisco, California ("SFRA") recognized as the local redevelopment  
5 authority by the Office of Economic Adjustment ("OEA") on behalf of the Secretary of  
6 Defense and also a local public authority legally empowered to enter into this Agreement.  
7 Hereinafter, the Navy and the SFRA are each sometimes referred to individually as a "Party"  
8 and collectively as the "Parties."

9  
10                                   **GENERAL PROVISIONS**

11  
12       The Federal Government, for and on behalf of the citizens of the United States of  
13 America, acts as the steward of certain real property on which it operates and maintains  
14 military facilities necessary for the defense of the United States of America. Certain military  
15 facilities are no longer required for that mission, and, in accordance with various base closure  
16 statutory authorities, the Department of Defense ("DOD") closed and plans to dispose of real  
17 and personal property at those facilities. The Navy is authorized to dispose of real and personal  
18 property on Hunters Point Naval Shipyard ("HPNS"), to the City of San Francisco or to a local  
19 reuse organization approved by the City, in accordance with Section 2824 (a) of the National  
20 Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended by Section  
21 2834 of the National Defense Authorization Action Act for Fiscal Year 1994 (Public Law 103-  
22 160). The SFRA is a local reuse organization approved by the City of San Francisco to accept  
23 conveyance of HPNS property in accordance with the authorities set out above.

24  
25       The Parties did execute and enter into that certain *Conveyance Agreement Between the*  
26 *United States of America, Acting by and through the Secretary of the Navy, and the San*  
27 *Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard*, dated  
28 March 31, 2004 ("Conveyance Agreement").

29  
30       Under the Comprehensive Environmental Response, Compensation and Liability Act  
31 ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), Federal property may be transferred prior to the



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 completion of all remedial action necessary to protect human health and the environment. Under  
2 this early transfer authority, the Navy intends to convey title to the portion of HPNS property  
3 known as the Area Covered by Environmental Services (hereinafter "ACES"), to the SFRA.  
4 The ACES is defined in Section 222 below and shown in Appendix 2. The SFRA  
5 assumes responsibility for certain environmental response activities (hereinafter the  
6 "Environmental Services," as defined in Section 211 below) for the consideration set forth in  
7 this Agreement. The principal purpose of this Agreement is to facilitate early transfer and  
8 redevelopment by providing the contractual vehicle under which the SFRA will perform the  
9 Environmental Services in the ACES and be compensated for such performance.

10  
11 It is in the public interest and will be beneficial to the Navy and the SFRA for the SFRA  
12 to cause to be performed the Environmental Services at the ACES. As set forth in the  
13 Amended Federal Facilities Agreement ("Amended FFA"), as defined in Section 231 below,  
14 the Navy will resume CERCLA responsibility for Environmental Services for compliance with  
15 the Amended FFA in the event of a Finding of Default as provided in the Administrative Order  
16 on Consent ("AOC") as hereinafter defined, or upon a failure of the Navy to continue its  
17 funding obligations, as described in Article IV, or upon a termination of this Agreement  
18 pursuant to Article X. The Navy's obligations pursuant to the Amended FFA are not affected  
19 by this Agreement with respect to Navy Retained Conditions, as defined in Section 206.

20  
21 This Agreement benefits the Navy and the SFRA because it facilitates early transfer and  
22 immediate reuse by allowing the SFRA to cause to be performed certain environmental  
23 remediation activities and simultaneously facilitates redevelopment as defined herein. This  
24 Agreement, executed as part of an early transfer, facilitates SFRA access and control to the  
25 ACES in conjunction with implementation of the SFRA's Reuse Plan (as defined in Section  
26 220 below). In addition, early transfer will allow the Navy to convey title in compliance with  
27 CERCLA requirements at an earlier date than could otherwise be achieved. This Agreement is  
28 a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10 U.S.C. Section  
29 2701(d)(1).

30  
31 In accordance with 42 U.S.C. 9620 (h)(3)(C)(iii), after all remedial action necessary to  
32 protect human health and the environment with respect to any hazardous substances remaining  
33 on the ACES on the date of transfer has been taken, the Navy will deliver to the SFRA an  
34 appropriate document containing the CERCLA warranty that "... all response action necessary  
35 to protect human health and the environment has been taken by the United States...."

36  
37 The Navy and the SFRA have entered into this Agreement for the purpose of  
38 establishing the terms and conditions necessary to obtain Regulatory Closure for the ACES and  
39 ensure the execution of Long-Term Obligations associated with Regulatory Closure. The Navy  
40 agrees to provide funds to the SFRA in accordance with and subject to the provisions of this  
41 Agreement and to undertake and complete its obligations under Section 302 hereof. The SFRA  
42 agrees to perform the Environmental Services in accordance with and subject to the provisions of  
43 this Agreement.

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## Article I SCOPE AND PURPOSE

### Section 101. Performance of Environmental Services

The SFRA shall cause to be performed the Environmental Services in accordance with and subject to the provisions of this Agreement. The Environmental Services, to the extent required to be performed under this Agreement, with regard to the ACES, shall satisfy the requirements of (i) CERCLA as provided for in the CERCLA RODs (as defined in Section 207), the National Contingency Plan ("NCP"), and the Administrative Order on Consent (as hereinafter defined), and (ii) applicable State and Federal laws and regulations governing releases of petroleum as provided in the Petroleum Corrective Action Plans as defined in Section 232). The Navy shall remain responsible for any Navy-Retained Conditions.

### Section 102. Performance Method

The CERCLA RODs, PCAPs and AOC together establish the process for obtaining Regulatory Closure within the ACES. By the execution of this Agreement, the Navy concurs with the process set forth in the CERCLA RODs, PCAPs and AOC, and all documents and approvals referenced therein.

## Article II DEFINITIONS

### Section 201. Agreement

The term "Agreement" means this Early Transfer Cooperative Agreement.

### Section 202. Navy's Representative

The Navy's representative for execution purposes is Naval Facilities Engineering Command, which is responsible to the office of the Secretary of the Navy for environmental remediation within the ACES, or its successor.

### Section 203. SFRA

The term "SFRA" means the San Francisco Redevelopment Agency, a Redevelopment Authority of the State of California, recognized as the local redevelopment authority for the HPNS by the OEA on behalf of the Secretary of Defense. The SFRA is an entity that is within the meaning of the term "local government agency" as such term is used in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into "agreements on a reimbursable or other basis."

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

### Section 204. Hunters Point Naval Shipyard

The term "Hunters Point Naval Shipyard" or "HPNS" means that portion of the real property at the former Hunters Point Naval Shipyard, shown on the map attached as Appendix 1 and incorporated herein by reference.

### Section 205. Administrative Order on Consent ("AOC").

The term "Administrative Order on Consent" or "AOC" means that certain signed agreement executed between the SFRA, [Lennar entity] and the Environmental Regulatory Agencies.

### Section 206. Navy-Retained Conditions

The term "Navy-Retained Conditions" means any condition or cost associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; Radiological Materials; and Uninsured Unknown Conditions. The term shall also include (i) the performance of CERCLA five-year reviews for years 2013, 2018, 2023 and 2028 for remedies selected in a CERCLA ROD issued by the Navy, (ii) any other activity identified as the responsibility of the Navy in the Amended FFA, and (iii) any change to the requirements in the CERCLA RODs, PCAP, or AOC set forth in an Explanation of Significant Differences under CERCLA or a ROD amendment or a PCAP amendment (or any other change required by the Regulatory Agencies to the requirements in the CERCLA RODs, PCAP or AOC), to the extent the costs associated with such change are not covered, or to the extent they are covered, they could result in an exhaustion of coverage by the Insurance Policies; to the extent such changes are the result of negligent acts or omissions of the Navy or parties acting on behalf of the Navy, such costs are Navy Retained Conditions even if covered by the Insurance Policies; to the extent such changes are the result of negligent acts or omissions by the SFRA or parties acting on behalf of the SFRA, such costs are not Navy Retained Conditions, even if they are not covered by the Insurance Policies.

### Section 207. CERCLA RODs

The term "CERCLA RODs" means the CERCLA Record of Decision for Parcel B dated \_\_\_\_\_, and the CERCLA Record of Decision for Parcel G dated \_\_\_\_\_.

### Section 208. Regulatory Closure

The Term "Regulatory Closure" means approval or certification of completion of any necessary remedial or corrective action required by the CERCLA RODs, the PCAPs and the AOC, or the issuance of a "No Further Action" letter or equivalent finding by the appropriate Environmental Regulatory Agency or Agencies pursuant to the statutes and regulations administered by those Agencies with respect to the ACES and undertaken by the SFRA

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

pursuant to this Agreement. The term "Regulatory Closure" shall include without limitation and as set forth in the AOC (i) Completion of the Work with respect to the ACES, (ii) Completion of the Remedial Action with respect to specific remedial actions, notwithstanding Long-Term Obligations, and (iii) Conclusion of Remedial Action Activities with respect to specific development areas within the ACES, notwithstanding Long-Term Obligations.

### **Section 209.** Navy and Government

The terms "Navy" and "Government" are used interchangeably herein.

### **Section 210.** Long-Term Obligations

The term "Long-Term Obligations" means any long-term review, monitoring, reporting and institutional control ("IC") and operation and maintenance requirements that are required in support of and after Regulatory Closure and associated with or in furtherance of the CERCLA RODs, PCAPs and AOC, including providing existing records and reports for the Navy's preparation of the CERCLA five year reviews for years 2013, 2018, 2023 and 2028 and SFRA preparation of the CERCLA five-year reviews thereafter.

### **Section 211.** Environmental Services

The term "Environmental Services" means activities solely with respect and limited to Known Conditions and Unknown Insured Conditions necessary to obtain Regulatory Closure, and which provide for the performance of associated Long-Term Obligations upon which such Regulatory Closure is conditioned. Environmental Services does not include the performance of Ineligible Work as defined in Section 218 below.

### **Section 212.** Known Conditions

The term "Known Conditions" means those environmental conditions in the ACES expressly set forth in Appendix 3 to this Agreement and includes a contaminant at a site that is, based upon the state of scientific knowledge at the time that this Agreement is executed, a scientifically-accepted "break-down" or "daughter" or "parent" of a contaminant identified in Appendix 3 as being present at that respective site. Notwithstanding any environmental conditions set forth in Appendix 3, or associated "break-down," "daughter," or "parent" product, in no event shall the term "Known Conditions" include "Navy-Retained Conditions" as defined above and in Section 206.

### **Section 213.** Insured Unknown Conditions

The term "Insured Unknown Conditions" means those environmental conditions in the ACES that are not Known Conditions and are within the coverage grant of, and for which, and to the extent, the SFRA is paid pursuant to, the Environmental Insurance Policies. This term

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

also includes a specific Unknown Condition that otherwise would have been an Insured Unknown Condition but for which coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies ("Excluded Insured Unknown Condition"). The term "Insured Unknown Conditions" shall include Excluded Unknown Insured Conditions only to the extent of specific costs that would have otherwise been funded by the Environmental Insurance Policies but for such failure of the SFRA or the named insured.

### **Section 214.** Uninsured Unknown Conditions

The term "Uninsured Unknown Conditions" means those environmental conditions in the ACES that are neither Known Conditions or Insured Unknown Conditions.

### **Section 215.** Radiological Materials

The term "Radiological Materials" means solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides defined as being derived from the Navy's work on the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products commonly used in non-military applications such as tungsten welding electrodes and household smoke detector components. [Need to discuss procedures in event Radiological Materials are encountered unexpectedly.]

### **Section 216.** Environmental Insurance Policies

The term "Environmental Insurance Policies" means the environmental insurance policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.

### **Section 217.** Reserved

### **Section 218.** Ineligible Work

The term "Ineligible Work" means the performance of any or more of the following work:

a. Cleanup of lead based paint ("LBP") and asbestos containing materials ("ACM") incorporated into building materials in their original location.

b. Cleanup of pesticides and herbicides applied in accordance with the

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and its predecessors including, but not limited to, chlordane properly applied as a termiticide to presently existing wooden structures and their foundations, to the extent such work is covered by Environmental Insurance Policies. [(1) How do we determine that pesticides were properly applied 30 years ago. (2) If chlordane at unacceptable levels is encountered in soil where no current building exists, that should be Navy Retained].

c. Management and off-site disposal of contaminated soil or solid waste excavated or generated during the course of Redevelopment Activity within any portion of the ACES for which all appropriate Environmental Regulatory Agencies have previously approved Regulatory Closure following (1) the installation of a cap/cover remedial action by the SFRA, or (2) issuance of an approved Response Action Completion Report ("RACR") following installation of a cap/cover remedial action by the Navy.

d. Additional remediation necessary to implement a change in land use from the land uses set forth in the Reuse Plan.

e. Management and disposal of construction and demolition debris generated in the course of Redevelopment Activity.

f. Clean up of contaminants within existing buildings and structures, that have not been released into the environment; except the following shall not be Ineligible Costs (1) removal of liquids, solids, gases, sediments, and/or sludges from and including oil/water separators and other equipment and containment vessels within or beneath structures; and (2) friable, accessible asbestos to the extent the equipment, vessels or asbestos were not reasonably discovered by visual inspection during a walk-through in which both parties participated.

g. Any reconstruction, alteration, or replacement of any initial cap/cover containment remedial action constructed pursuant to a ROD unless such cap/cover is deemed not to be operating properly and successfully or is otherwise determined by an Environmental Regulatory Agency to have failed.

h. Non-cleanup environmental compliance activities relating to redevelopment/construction following conveyance (e.g., compliance with air quality permit requirements for control of fugitive dust emissions that are not contaminated with hazardous substances or petroleum and the National Pollutant Discharge Elimination System ["NPDES"]) stormwater discharge permit requirements regulating excavation/disturbance of soil that is not contaminated with hazardous substances or petroleum).

i. Any other work or activity that is not related to: (1) achieving "Regulatory Closure" for releases of hazardous substances or petroleum within the ACES, or (2) performing associated "Long-term Obligations."

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

j. Regulatory Enforcement Activities unrelated to regulatory oversight pursuant to the CERCLA RODS, PCAPs, or the AOC.

k. Cleanup that is required as a result of a violation of (1) use restrictions by the SFRA, its successors and assigns, or (2) any land use restriction, groundwater restriction, deed covenant or IC applicable to the ACES.

l. Cleanup arising from the failure of the SFRA, its successors and assigns, to operate or maintain a remedy as required by USEPA through the CERCLA RODs, PCAPs, AOC, Land Use Control Remedial Design Reports ("LUC RD"), Risk Management Plan ("RMP") and/or Operation and Maintenance Plan ("OMP").

Notwithstanding anything to the contrary in this Section 218, in no event shall performance of any work in accordance with Sections 301(f) and (g) and 302(d) with respect to Navy-Retained Conditions be considered "Ineligible Work."

### **Section 219. Redevelopment Activity**

The term Redevelopment Activity means activities undertaken after the Effective Date of this Agreement in furtherance of the development of the property and not otherwise required by the CERCLA RODs, PCAPs, and/or AOC, including, but not limited to, construction of roads, utilities, and structures and demolition and/or removal of "hardscape" such as roads, sidewalks, and building foundations; provided, that any Navy Retained Conditions discovered during the course of a Redevelopment Activity, shall remain as and be treated as Navy Retained Conditions.

### **Section 220. Reuse Plan**

The term "Reuse Plan" means that certain Redevelopment Plan for the HPNS, approved by the Mayor and Board of Supervisors for the City of San Francisco in July of 1997, as such Redevelopment Plan has been amended or superseded as of the date of the execution of this Agreement, all in accordance with the California Community Redevelopment Law (Health and Safety Code Section 33000, et seq.

### **Section 222. Area Covered by Environmental Services**

The term "Area Covered by Environmental Services" or "ACES" means that area identified on the map in Appendix 2, and specifically excludes IR Sites 7/18 and the radiation-impacted area around Building 140. The conveyance of IR Sites 7/18 and the radiation-impacted area around Building 140 will be addressed separately in accordance with that certain *Agreement to Implement the Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point*

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

*Naval Shipyard with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140* dated \_\_\_\_\_, and set forth in Appendix 13.

### **Section 223.** Unexploded Ordnance/Munitions or Explosives of Concern

The term "Unexploded Ordnance" or "UXO" means Military Munitions that have been fired, dropped, launched, projected, or otherwise placed, abandoned or disposed of in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

### **Section 224.** Military Munitions

The term "Military Munitions" means all ammunition products and components produced or used by or for DOD or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy ("DOE") and National Guard personnel. The term "Military Munitions" includes but is not limited to confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. The term "Military Munitions" does not include wholly inert items and non-standard explosive devices made from either military or non-military materials by personnel unrelated to DOD. However, the term "Military Munitions" does include non-nuclear components of nuclear devices managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011 et seq., have been completed.

### **Section 225.** Navy Obligations

The term "Navy Obligations" means the obligations of the Navy as set forth in Section 302 hereof.

### **Section 226.** Regulatory Oversight

a. The term "Regulatory Oversight" includes the following services provided by the United States Environmental Protection Agency ("USEPA"), the California Department of Toxic Substances Control ("DTSC"), the San Francisco Bay Water Quality Control Board ("Water Board"), the California Department of Public Health ("CDPH"), or other independent State or Federal regulatory agency with jurisdiction over the ACES, which are considered allowable costs under this Agreement. Technical review of documents or data;



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

b. Identification and explanation of state applicable or relevant and appropriate requirements (ARARs);

c. Site visits other than enforcement inspections;

d. Technical Review Committee (TRC) or Restoration Advisory Board (RAB) participation;

e. Administration of the Cooperative Agreement, technical review and comment on all documents and data regarding DoD prioritization of sites;

f. Determination of scope and applicability of agreements [elaborate], excluding any litigation costs against the U.S. Government;

g. Independent quality assurance/quality control samples.

h. Any other services or costs associated with oversight of the Environmental Services which are not Regulatory Enforcement Activities.

### **Section 227. Regulatory Enforcement Activities**

In accordance with 10 U.S.C. 2701(d)(3), regulatory enforcement costs are not allowable costs under this Agreement. The term "Regulatory Enforcement Activities" includes:

a. Activities associated with the City of San Francisco taking, or preparing to take, enforcement actions against third parties for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety or alleged violations of land use restrictions set forth in quitclaim deed(s) or in a CRUP, as hereinafter defined, on the ACES; or

b. Activities associated with USEPA, DTSC, the Water Board, CDPH, or other independent State or Federal regulatory agency with jurisdiction over the ACES taking, or preparing to take, enforcement actions against the SFRA, or its contractors or agents, for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety.

### **Section 228. Grants Officer**

The Navy's Grants Officer is the Director of Acquisition, NAVFACENGCOM, and is the only authorized Government official who can make changes and obligate funds under this Agreement.

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

### **Section 229. Environmental Regulatory Agency or Agencies**

The term "Environmental Regulatory Agency or Agencies" means the USEPA, DTSC, the Water Board, CDPH, or other independent State or Federal regulatory agency with jurisdiction over the ACES.

### **Section 230. Covenant to Restrict the Use of Property**

The term "Covenant to Restrict the Use of Property" or "CRUP" means that certain document required by the CERCLA RODs that identifies the environmental covenants and restrictions that shall apply to the ACES. These environmental covenants and restrictions are necessary for the protection of human health and the environment and the implementation of final remedies for the ACES.

### **Section 231. Amended Federal Facilities Agreement**

The term "Amended Federal Facilities Agreement" or "Amended FFA" means that certain document executed by the Navy, USEPA, DTSC, and the Water Board dated \_\_\_\_\_, whereby the parties to the original Federal Facilities Agreement for the HPNS dated \_\_\_\_\_ ("FFA"), amended such FFA.

### **Section 232. Petroleum Corrective Action Plans**

The term "Petroleum Corrective Action Plans" or "PCAPs" means the Petroleum Corrective Action Plan entered into among SFRA, the Water Board and DTSC effective concurrent with the Effective Date and addressing petroleum releases associated with the ACES that are not otherwise addressed within the CERCLA RODs.

## **A r t i c l e   I I I**

### **OBLIGATIONS OF THE PARTIES**

### **Section 301. Obligations of the SFRA**

a. In consideration of the Navy's agreement to pay the SFRA for allowable costs in the amount specified in Section 302 below, in accordance with the payment schedule set forth in Appendix 11, the terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations ("CFRs"), and the applicable Office of Management and Budget ("OMB") Circulars, the SFRA assumes responsibility for performing the Environmental Services. Subject to the provisions of Sections 302 hereof, the SFRA agrees that it shall cause to be performed the necessary Environmental Services even if the costs associated therewith exceed the funds provided by the Navy hereunder. The SFRA's obligation to perform Environmental Services is expressly conditioned upon the Navy providing funding for performing the Environmental Services in accordance with Section 302 hereof. However, to the extent that

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 the Navy pays a portion of the funding set forth in Section 302 hereof, but fails to pay the full  
2 amount set forth in that Section, or in the event that the Agreement terminates pursuant to  
3 Section 1003 hereof, the SFRA's obligations shall be limited to only that portion of  
4 Environmental Services which have been performed by use of the funds actually provided by  
5 the Navy or the insurer as set forth in Section 712.B hereof. Any dispute with respect to  
6 delineating the portion of the Environmental Services performed with the use of such partial  
7 funding shall be subject to dispute resolution pursuant to Section 1001 hereof. The SFRA  
8 shall make reasonable progress toward performing Environmental Services.

9  
10 b. The SFRA shall conduct audits and shall provide performance and financial  
11 reports to the Navy in accordance with Section 301.e. below.

12  
13 c. The SFRA shall cause the performance of the Environmental Services in a  
14 manner that will not unreasonably delay the Navy's performance of its obligations under Section  
15 302 hereof with respect to the Navy-Retained Conditions.

16  
17 d. The SFRA shall indemnify the Navy pursuant to the terms of Section 711.0  
18 hereof, but only to the extent that such obligation arises from Environmental Services  
19 performed, and for which the Navy has provided funds.

20  
21 e. Non-Federal Audits, Performance Reporting & Financial Reports.

22  
23 (1) The SFRA is responsible for obtaining annual audits in accordance with  
24 the Single Audit Act Amendments of 1996 (31 USC 7501-7507) and revised OMB Circular A-  
25 133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be  
26 made by an independent auditor in accordance with generally accepted government auditing  
27 standards covering financial audits. The costs of audits made in accordance with this section  
28 are allowable costs under this Agreement.

29  
30 (2) The SFRA is responsible for assuring compliance with applicable  
31 Federal requirements and that performance goals are being achieved. In accordance with 32  
32 CFR 33.40, the SFRA shall submit annual performance reports to the Navy.

33  
34 (3) In accordance with 32 CFR 33.41, the SFRA shall submit annual  
35 financial status reports to the Navy.

36  
37 f. The SFRA shall provide the Navy notice within thirty (30) calendar days of  
38 receiving notice by Environmental Regulatory Agencies, or other third parties, of the existence  
39 of any condition at the ACES that suggests that an action is necessary for which the SFRA is  
40 not responsible under this Agreement. If the SFRA is served with a complaint or written notice  
41 by an Environmental Regulatory Agency, the SFRA shall provide the Navy with a copy of such  
42 document no later than seven (7) calendar days following the service of such document.

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

g. Within thirty (30) calendar days of receiving actual notice of any condition at or affecting the ACES or that the SFRA discovers, for which the SFRA is not responsible under Section 302 hereof, the SFRA shall notify the Navy of such condition. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty-four (24) hours of any such discovery. The Parties shall, within five (5) business days after such notification, meet and confer regarding the terms on which the Navy may return to conduct any additional remedial action found to be necessary or provide funds to the SFRA in amounts sufficient to take any necessary actions required by CERCLA.

h. Notwithstanding the provisions of the preceding Section 301.e. hereof, but subject to the Navy's funding limitation as set forth in Section 401 hereof, the SFRA shall have the right, but not the duty, to take or cause to be taken the following actions within the ACES with respect to Navy-Retained Conditions:

(1) Investigation Activities. Any activity necessary to determine the existence, nature, character and extent of conditions that may constitute Navy-Retained Conditions.

(2) The SFRA shall notify the Navy within fifteen (15) business days after the SFRA takes or causes to be taken any action under Section 301.f.(1) hereof. If the Navy disputes an SFRA action taken under Section 301(1), the Navy may initiate dispute resolution procedures under Section 1001 hereof.

i If the SFRA discovers a condition in the ACES that the SFRA reasonably believes is a Navy-Retained Condition, the SFRA shall make an initial determination whether such condition is in fact a Navy-Retained Condition before incurring such costs or obligations (other than such costs and obligations reasonably necessary to make such initial determination). If, despite using its commercially reasonable efforts to avoid incurring such costs, the SFRA incurs costs or obligations with respect to a Navy-Retained Condition, the SFRA may seek reimbursement from the Navy, subject to the Navy's funding limitation as set forth in Section 401, hereof, and the dispute resolution provisions of Section 1001 hereof.

j. The SFRA shall provide to the Navy all information obtained or developed by the SFRA with respect to any Navy-Retained Conditions that the SFRA discovers.

k. The SFRA shall obtain the Environmental Insurance Policies, and other insurance required, as described in Section 712, herein.

l. The SFRA shall conduct annual site inspections to ensure compliance with the Long Term Obligations by future transferees of the ACES and prepare compliance monitoring reports and certificates as required by the CERCLA RODs. The SFRA shall notify and obtain approval from the Navy, which shall not be unreasonably withheld, of any change in land use

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

that is inconsistent with the use restrictions and assumptions contained in the CRUP or described in the CERCLA RODs. After receiving approval from the Navy, the SFRA shall notify and obtain approval for such use from the other signatories to the Amended FFA.

### Section 302. Obligations of the Navy

a. The maximum funding obligation of the Navy to the SFRA for performing the Environmental Services during the term of this Agreement is \$\_\_\_\_\_, which shall be paid in installments, in accordance to the Payment Schedule set forth in Appendix 11. All payments by the Navy shall be made to \_\_\_\_\_, in their capacity as escrow agent ("Escrow Agent") pursuant to the Agreement. The Escrow Agent shall release funds to the SFRA in accordance with the escrow agreement set forth in Appendix 12 ("Escrow Agreement"). As set forth in the Payment Schedule, the first payment by the Navy shall be made to the Escrow Agent within \_\_\_ days after approval of the early transfer by the Administrator of USEPA and concurrence by the Governor of California. The Navy's obligation to pay hereunder is subject to the availability of appropriated funds and the Payment Schedule shall not be interpreted to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. 1341). With respect to any payments other than the first payment, the Navy shall provide XX days notice to SFRA whether each subsequent payment will be made in accordance with the Payment schedule.

b. As set forth in the Escrow Agreement, the Navy shall deposit with the Escrow Agent a fully executed deed conveying title to the ACES from the Navy to the SFRA within \_\_\_days after approval of the early transfer by the Administrator of USEPA and concurrence by the Governor of California. The Escrow Agent shall record such deed and disburse Navy funds deposited with the Escrow Agent all as set forth in the Escrow Agreement.

c. Within thirty (30) calendar days after the SFRA has provided the Navy with:

(1) proper documentation establishing that Regulatory Closure has been obtained for the ACES, or portions of the ACES, as set forth in the AOC, and

(2) a written request from the SFRA to issue the appropriate CERCLA warranty for the ACES, or such portions of the ACES, the Navy shall issue to the SFRA the warranty required under CERCLA, Section 120(h)(3)(C)(iii). The SFRA shall bear the costs of preparing any new legal descriptions for the CERCLA warranty to be recorded.

d. Within thirty (30) calendar days after receiving any notice from the SFRA under Section 301.d. or 301.e. hereof, the Navy shall confer with the SFRA with regard to any Navy-Retained Condition at issue. The exception to these terms is that the Navy shall confer with the SFRA within five (5) business days after receiving any notice concerning the presence of UXO, biological warfare agents, chemical warfare agents or Radiological Materials. The Navy and the SFRA, in consultation with the appropriate Environmental Regulatory Agency or Agencies,

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

shall (i) endeavor to agree to any necessary actions to be taken by the Navy with respect to Navy-Retained Conditions, subject to the availability of funds, or (ii) attempt to agree on the funds to be provided by the Navy to the SFRA to enable the SFRA to take such actions as may be required by the appropriate Environmental Regulatory Agency or Agencies, subject to the availability of funds. If the Navy takes action(s) with respect to the Navy-Retained Conditions, it shall cause the performance of such action(s) in a manner that will not unreasonably delay the SFRA's performance of its obligations under Section 301 hereof. If the Parties cannot agree whether an environmental condition constitutes a Navy-Retained Condition, or disagree about the action required in response to any such condition under CERCLA, the matter may be submitted to dispute resolution under Section 1001. Consistent with the provisions of above Section 301.f., the SFRA may take any actions deemed necessary, and seek reimbursement from the Navy for the costs associated with such actions.

e. Any Navy liability for the death of or injury to any person, or the loss of or damage to any property, caused by Navy use of the ACES shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended), or as otherwise provided by law.

f. [TRANSITION PLAN OBLGATIONS?]

### Article IV FUNDING LIMITATION AND BUDGETING

#### Section 401. Navy's Funding Limitation

The maximum Navy funding obligation for the Environmental Services to be performed by the SFRA under this Agreement is \$ \_\_\_\_\_. Except as may otherwise be provided in Section 302 above, the Navy will not pay any Environmental Service costs that exceed the amount described in Section 302.a. above. The Navy's obligation to pay any costs hereunder is subject to the availability of appropriated funds. Nothing in this agreement shall be interpreted to establish obligations or require payments by the Navy in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. The SFRA incurs any additional costs, including any costs for services or activities determined to be defined as Ineligible Work, at its own risk.

INSERT THE UIC AND LINE OF ACCOUNTING HERE

### Article V PAYMENT SCHEDULE

#### Section 501. General

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 Subject to the Availability of funds, the Navy shall deposit funds with the Escrow  
2 Agent in accordance with the Payment Schedule set forth in Appendix 11 in compliance with  
3 the provisions of 32 CFR Part 33, OMB Circular A-87 and OMB Circular A-102. The Escrow  
4 Agent shall disburse funds to the SFRA in accordance with the Escrow Agreement set forth in  
5 Appendix 12.

### 6 7 **Section 502. Payments**

8  
9 a. The amount provided by the Navy to the Escrow Agent in accordance  
10 with Section 302.a. is an advance payment to the SFRA made in accordance with the  
11 advance payment requirements of 32 CFR §33.21(c), as follows:

12  
13 (1) The SFRA shall maintain or demonstrate the willingness and ability to  
14 maintain procedures to minimize the time elapsing between the receipt of the funds by the  
15 Escrow Agent and their disbursement by or on behalf of the SFRA.

16  
17 (2) The Escrow Agent shall be responsible for making all payments to a  
18 subsequent transferee and/or environmental contractor(s), with whom the SFRA enters into an  
19 agreement to perform the Environmental Services or to supervise the performance of the  
20 Environmental Services. Funds shall be considered disbursed by the SFRA when the following  
21 has occurred:

22  
23 (A). The Escrow Agent does not retain possession of the funds;

24  
25 (B). The Escrow Agent or the SFRA cannot get the funds back upon  
26 demand (this does not include allowable costs incurred by the SFRA for which the SFRA  
27 requests proper reimbursement from the Escrow Agent);

28  
29 (C). The SFRA receives something in exchange for the transfer of  
30 funds by the Escrow Agent to an independent third party payee, such as a contractual promise  
31 to hold the funds and make payments in accordance with specified procedures.

32  
33 (3) The Escrow Agreement must include the above provisions and satisfy the  
34 requirements of 32 CFR §33.21(c).

35  
36 (4) Interest. Any interest earned on the advance payment prior to the  
37 disbursement of those funds by the Escrow Agent in accordance with the Escrow Agreement  
38 above must be returned to the Navy in accordance with 32 CFR §33.21(h)(2)(i), or otherwise  
39 credited to the Navy for the purposes of this Agreement. However, any interests earned on  
40 those funds after disbursement by the Escrow Agent are considered funds to be utilized for the  
41 purposes of this Agreement.

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## Article VI PAYMENT

### Section 601. RESERVED

### Section 602. Relation to Prompt Payment Act.

This Agreement is not a contract as defined under OMB Circular A-125, which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.). Accordingly, the Navy is not liable to the SFRA for interest on any untimely payments under this Agreement.

### Section 603. Direct Navy Payment of SFRA Obligations

The Navy is not in privity with, and shall not directly pay any SFRA contractors, employees, vendors, or creditors for any costs incurred by the SFRA under this Agreement. The Navy assumes no liability for any of the SFRA's contractual obligations that may result from any SFRA performance of duties under this Agreement. The Navy assumes no liability hereunder for any SFRA contractual obligations to any third parties for any reason. The SFRA hereby agrees to defend and hold the Navy harmless from any such liabilities.

## Article VII GENERAL PROVISIONS

### Section 701. Term of Agreement

Unless terminated under Section 1003 below, this Agreement shall remain in effect until Regulatory Closure within the ACES has been obtained. Only the following two terms of this Agreement shall survive such termination, and then only if the Agreement is not terminated as a result of the Navy's failure to provide the funds specified in Sections 302.A and 302.B above or other Navy default:

a. SFRA requirements to maintain compliance under the CERCLA RODs, PCAPs, and AOC and to comply with any applicable Long-Term Obligations;

b. the SFRA's and the Navy's obligations under Section 711 below (including the relevant provisions of Sections 101, 102, 301.A, 302, 703, 706, 707, and 801 cross-referenced in Section 711), and; (iii) Section 715.

### Section 702. Amendment of Agreement

Only a written instrument signed by the parties hereto may amend this Agreement.



# **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

## **Section 703. Successors and Assigns**

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

## **Section 704. Entire Agreement**

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement.

## **Section 705. Severability**

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

## **Section 706. Waiver of Breach**

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party, and no "course of conduct" shall be considered to be such a waiver, absent the waiver being documented in a mutually signed writing.

## **Section 707. Notices**

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

### **With Regard to the Navy:**

Director, Base Realignment and Closure Management Office  
Department of the Navy  
1455 Frazee Road, Suite 900  
San Diego, CA 92108

### **With a copy to:**

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

### With Regard to the SFRA:

San Francisco Redevelopment Agency  
One South Van Ness Avenue  
Fifth Floor  
San Francisco, CA 94103  
Attn: \_\_\_\_\_

### With a copy to:

Celena Chen, Senior Attorney  
San Francisco Redevelopment Agency  
One South Van Ness Avenue  
Fifth Floor  
San Francisco, CA 94103

### With a copy to:

Elaine Warren, Assistant City Attorney  
Office of City Attorney  
City of San Francisco City Hall  
Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682

### With a copy to:

George R. Schlossberg, Esq.  
Kutak Rock LLP  
1101 Connecticut Avenue, N.W.  
Washington, D.C. 20036

### Section 708. Conflict of Interest

The SFRA shall ensure that its employees are prohibited from using their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others.

### Section 709. Access to and Retention of Records

The SFRA shall afford any authorized representative of the Navy, DOD, the Comptroller General, or other Federal Government agency access and the right to examine all SFRA records, books, papers, and documents related to the SFRA's performance under this

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Agreement and are otherwise required to be retained under the AOC. This includes all such records in automated forms ("Records") that are within the SFRA's custody or control, and that relate to its performance under this Agreement. This right of access excludes any attorney-client communications, attorney work product, or any other legally privileged documents. The SFRA shall retain required records intact in their original form, if not the original documents, or in another form if the Navy approves. Such approval shall not be unreasonably withheld. SFRA record retention requirements shall extend for at least three (3) years following the completion or the termination of this Agreement. The SFRA shall allow the Navy access to the SFRA's records during normal business hours. The Navy will give the SFRA seventy-two (72) hours prior notice of its intention to examine the SFRA's records, unless the Navy determines that more immediate entry is required by special circumstances. Any such entry shall not give rise to any claim or cause of action against the Navy by the SFRA or any officer, agent, employee, or contractor thereof.

### **Section 710.** Change of Circumstances

Each Party will promptly notify the other Party of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such Party's ability to perform this Agreement.

### **Section 711.** Liability and Indemnity, Waiver and Release

#### **a.** The SFRA's Obligations and Limited Waiver of Statutory Rights

(1) In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, the SFRA agrees that it shall, upon receipt of the total payment of the grant award, indemnify and hold the Navy harmless for any of the following, provided, however the SFRA's indemnification obligations under this subparagraph (1)(a) shall in no event apply to Navy-Retained Conditions or Uninsured Unknown Conditions:

(A) any response cost claims for Known Conditions in the ACES, but only to the extent that such response cost claims result from and are associated with Known Conditions; or any "Ineligible Work" as set forth in Section 218 above performed or caused to be performed by the SFRA;

(B) oversight costs for any remedy implemented by the SFRA to the extent that the SFRA is required to install such remedy to achieve Regulatory Closure under this Agreement;

(C) all claims for personal injury or property damage to the extent caused by the SFRA or its contractors in the course of performing the Environmental Services;

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 (D) all natural resource damage claims pursuant to 42 U.S.C. Section  
2 9607(a)(4)(C) pertaining to releases of hazardous substances, but only to the extent that such  
3 damages were caused, or contributed to, by the negligent or wrongful actions of the SFRA, its  
4 contractors or its successors in interest;

5  
6 (E) all costs arising from any negligent performance of the  
7 Environmental Services which SFRA performs or causes to be performed;

8  
9 (F) all costs of additional remediation required on or within the  
10 ACES as a result of a change in land use from that upon which the initial remedial action  
11 selection decision was based when Regulatory Closure was completed;

12  
13 (G) all costs associated with the correction of any failure of any Navy-  
14 selected remedy implemented by the SFRA, but only to the extent such costs are directly  
15 attributable to the poor workmanship or negligence of the SFRA or its contractors in the  
16 performance of said implementation;

17  
18 (H) all costs arising from the correction of any failure of any remedy  
19 both selected and implemented by the SFRA; and

20  
21 (I) all costs arising from or associated with claims addressed in the  
22 Waiver, Release and Covenant Not to Sue provisions set forth in Section 711.A(6) below.

23  
24 (2) With regard to the ACES, the Parties agree that the SFRA has provided  
25 financial assurances reasonably acceptable by the Navy to meet the requirements of 42 U.S.C.  
26 Section 9620(h)(3)(C)(ii).

27  
28 (3) Except as otherwise expressly provided by this Agreement, this  
29 Agreement shall not be construed to limit, expand or otherwise affect any right that the SFRA  
30 may have, in the absence of this Agreement, to take legal action to require the Navy to act with  
31 respect to Navy-Retained Conditions, or to seek damages resulting from the Navy's  
32 performance or failure to perform any actions with respect to Navy-Retained Conditions.  
33 Except as otherwise expressly provided by this Agreement, this Agreement shall also not be  
34 construed to limit, expand or otherwise affect any right that the Navy may have, in the absence  
35 of this Agreement, to take legal action against the SFRA.

36  
37 (4) Nothing in this Section creates rights of any kind in any person or entity  
38 other than the Navy and the SFRA.

39  
40 (5) The SFRA and the Navy agree that the Environmental Services to be  
41 caused to be performed by the SFRA in accordance with the terms of this Agreement does not  
42 include any work relating to, nor is the SFRA responsible for indemnification of the Navy for  
43 any work related to, Navy-Retained Conditions.

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

### Section 712. Liability and Insurance

a. The SFRA shall either self-insure, or carry and maintain general liability insurance, to afford protection with limits of liability in amounts not less than \$5,000,000.00 in the event of bodily injury or death to any number of persons in any one accident.

b. The SFRA agrees to bind subsequent to the execution of this Agreement, and with an effective date of conveyance, Environmental Insurance Policies with reasonably acceptable terms, conditions and coverages to the Navy which shall include both a Cleanup Cost Cap Policy ("Cost Cap Policy") for cost overruns associated with the performance of the Environmental Services and a Pollution Legal Liability Insurance Policy ("PLL Policy"), or similar coverages, and issued by an insurance carrier that is rated A.M. Best's or better, substantially similar to the Environmental Insurance Policies shown in Appendix 4. Such Policy or Policies will provide that the insurer waive its right of subrogation against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party any rights of action that the SFRA may have against the Navy under this Agreement, subject to the provisions of Section 711.above. The Navy shall be listed as an Additional Insured with respect to the coverage provided in any Environmental Insurance Policy or Policies. The Navy shall not otherwise be deemed an insured of, nor have any rights with respect to, any other grant of coverage under the Environmental Insurance Policies. [Availability of such Policy or Policies?]

c. **RESERVED for additional specific environmental insurance language to be developed.**

d. The SFRA will either self-insure or carry and maintain worker's compensation or similar insurance in the form and amounts required by law. If a worker's compensation or similar insurance policy is obtained, any such insurance policy will provide a waiver of subrogation of any claims against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party rights of action that the SFRA may have against the Navy.

e. General Liability Policy Provisions: All general liability insurance which the SFRA carries or maintains, or causes to be carried or maintained, under this Section 712 will be in such form, for such amounts, for such periods of time and with such insurers as the Navy may reasonably approve. Such Navy approval shall not be unreasonably withheld or delayed. All policies issued for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after the Navy receives written notice thereof. Any such policy shall also provide a waiver of subrogation of any claims against the Navy, and its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to a third party any rights of action which the SFRA may have against the

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 Navy. The Navy acknowledges and accepts the SFRA's self-insurance coverage for general  
2 liability, worker's compensation, or for any similar coverage.

3  
4 f. Delivery of Policies: The SFRA will provide the Navy with a certificate of  
5 insurance or statement of self insurance evidencing the insurance required for the SFRA. At  
6 least thirty (30) days before any such policy expires, the SFRA shall also deliver to the Navy a  
7 certificate of insurance evidencing each renewal policy covering the same risks.

### 8 9 **Section 713. Reports**

10  
11 To assure that the Navy will receive from the SFRA the appropriate documentation  
12 necessary for the Navy to execute the CERCLA covenant, the Navy may request that the SFRA  
13 provide additional information concerning the environmental condition of the ACES  
14 reasonably necessary to enable the Navy to execute the CERCLA covenant. As soon as  
15 possible after any such request is made, if the SFRA can reasonably obtain and release such  
16 information, the SFRA shall provide the Navy access to any documents containing such  
17 requested information. In any event, the SFRA agrees to provide the Navy such access within  
18 ten (10) business days of the Navy's information request.

### 19 20 **Section 714. Officials Not to Benefit**

21  
22 The SFRA acknowledges that no member or delegate to the United States Congress, or  
23 Resident Commissioner, shall be permitted to share in any part of this Agreement, or receive  
24 any benefit that may arise therefrom.

### 25 26 **Section 715. Representations**

27  
28 a. The Navy represents that:

29  
30 (1) it is fully authorized to enter into this Agreement;

31  
32 (2) the SFRA may rely on the data provided to the SFRA or its contractors by  
33 the Navy or the Navy's contractors for purposes of performing the Environmental Services and  
34 making any disclosures required under applicable law; and

35  
36 (3) the information provided to the SFRA by the Navy hereunder fairly and  
37 accurately represents the Navy's actual knowledge of the nature and extent of contamination  
38 within the ACES.

39  
40 b. To the extent (i) the data provided to the SFRA or its contractors by the Navy  
41 or the Navy's contractors for purposes of performing the Environmental Services and making any  
42 disclosures required under applicable law is not accurate, or (ii) the information provided to  
43 the SFRA by the Navy hereunder does not fairly and accurately represent the Navy's actual  
44 knowledge of the nature and extent of contamination within the ACES, and without limiting

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

any other remedies SFRA may have under this Agreement or at law or equity, SFRA shall be entitled to recover from the Navy any resulting additional costs and expenses to the extent necessary to obtain Regulatory Closure, subject to the availability of funds.

c. The SFRA represents that:

(1) it is a local reuse organization approved by the City in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended, and is fully authorized to enter into this Agreement; and,

(2) it enters into this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act, and,

(3) any provision of this Agreement that states or implies that the Navy will reimburse the SFRA for any costs incurred, or that the Navy will perform any actions with respect to Navy-Retained Conditions, are wholly subject to the Anti-Deficiency Act.

### **Section 716. Excess Funds**

Funds, as provided for in Section 401 and Section 502 above, are only to be expended for the purposes for which they were provided for under the terms of this Agreement. In accordance with the procedures outlined in 32 CFR 33.50, any funds paid to the SFRA that remain unencumbered for allowable costs, after all regulatory approvals have been obtained and the CERCLA warranty has been issued by the Navy, are funds which may be determined to be excess by the Navy and not authorized to be retained by the SFRA and upon written demand by the Navy, the SFRA must immediately refund to the Navy those excess funds.

## **A r t i c l e   V I I I**

### **APPLICABLE LAWS AND REGULATIONS**

#### **Section 801. Applicable Law**

This Agreement is entered into incident to the implementation of a Federal program. Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed exclusively by, and be construed only in accordance with Federal law.

#### **Section 802. Governing Regulations**

This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the following authorities: DoD Directive 3210.6; the Uniform Administrative Requirements for Grants and Cooperative Agreements; other applicable portions of Title 32 of the Code of Federal Regulations, and pertinent OMB

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

Circulars. If the provisions of this Agreement conflict with any such authorities, those authorities will govern.

### **Section 803. Environmental Protection**

Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.

## **A r t i c l e   I X PROCUREMENT**

### **Section 901. SFRA Contracts**

The SFRA's acquisition of goods and services to perform this Agreement will comply with the instructions and procedures contained in 32 CFR Section 33.36(b)(1) through (12). The SFRA must not contract with any party that is debarred, suspended, or otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension," and applicable DOD regulations thereunder.

### **Section 902. Preference for Local Residents**

a. Preference is allowed in entering into contracts with private entities for services to be performed at a military installation that is affected by closure or alignment under a base closure law. The Secretary of Defense may give preference, consistent with Federal, State, and local laws and regulations, to entities that plan to hire, to the maximum extent practicable, residents of the vicinity of such military installation to perform such contracts. Contracts for which the preference may be given include contracts to carry out environmental restoration activities or construction work at such military installations. Any such preference may be given for a contract only if the services to be performed under the contract at the military installation concerned can be carried out in a manner that is consistent with all other actions at the installation that the Secretary is legally required to undertake.

b. Definition. In this section, the term "base closure law" means the following:

(1) The provisions of title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(2) The Defense Base Closure and Realignment Act of 1990, as amended (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

c. Applicability - Any preference given under subsection (a) shall apply only to contracts entered into after the base closure law was enacted.



# **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

## **Article X TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION**

### **Section 1001. Dispute Resolution**

a. Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any Party with respect to disputes and the enforcement of any terms of this Agreement.

b. A dispute shall be considered to have arisen when one Party sends the other Party written notice of such dispute. Such written notice will include, to the extent available, all of the following information: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief, and; any documents or other evidence pertinent to the claim.

c. If a dispute arises under this Agreement, the Parties agree to attempt to resolve the dispute at the staff level. The Parties shall confer at the staff level within fifteen (15) days after a notice of dispute is received. Should staff-level discussions not resolve the dispute within such fifteen (15) day period (or longer, if agreed to by the Parties), the Parties agree to elevate the dispute to designated mid-level management. Mid-level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. If Mid-level management cannot timely resolve the dispute, the Parties agree to then raise the issue with their respective senior-level management. Senior -level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. Each Party shall have the discretion to determine the person(s) to represent it at any meeting convened under this section.

d. If the dispute cannot be resolved after exhausting the remedies under Section 1001c. above, the dispute shall be appealed to the Director of the Base Realignment and Closure Office at the address indicated in Section 707 above. Such appeal must be written, and contain all of the documentation and arguments necessary for a decision. The Director shall render a decision in a timely manner. If the SFRA disagrees with the Director's decision, the SFRA may, by providing notice to the other Party, pursue whatever remedies that the SFRA may have available at law or in equity.

e. To the extent that there is a conflict between the Dispute Resolution provisions or process set forth herein and any dispute resolution provisions or process contained in the Amended FFA, the dispute resolution provisions and process of the Amended FFA shall control.

### **Section 1002. Enforcement**

Either party may enforce this Agreement according to its terms. Without limiting either

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

party's enforcement rights, the Navy's enforcement rights for material breach by the SFRA, in accordance with the terms of 32 CFR Section 33.43, Enforcement, shall include:

a. Temporarily withholding cash payments pending correction of the deficiency by the SFRA or Sub-grantee or more severe enforcement action by the awarding agency;

b. Disallowing (denying both use of funds and matching credit for) all or part of the cost of the activity or action that is not in compliance;

c. Wholly or partly suspending or terminating the current award for the SFRA's or the Sub-grantee's program. Any award termination will be conducted under Section 1003 below.

d. Withholding further awards under this Agreement; and

e. Taking other remedies that may be legally available.

### Section 1003. Termination

a. This Agreement may terminate by its own terms under Section 701 above, or by a party under this Section 1003.

b. Reserved.

c. Reserved.

d. If a Party materially breaches this Agreement, the non-breaching party, to preserve its right to terminate, must provide the breaching party with a notice of intent to terminate. The breaching party shall have thirty (30) days to cure the breach, unless a longer period is agreed upon, in writing, by the parties. If the breaching party fails to cure the breach within the thirty (30) day (or longer, if agreed upon) period, then the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined under the dispute resolution procedures specified in Section 1001 above. Notwithstanding anything to the contrary in this Section 1003.d, the breaching party shall have ten (10) days to cure a breach that arises from any failure to make a required payment under this Agreement.

e. If this Agreement is terminated for reasons other than those set forth in Section 701 above, the SFRA shall immediately:

(1) Stop work;

(2) Place no further subcontracts or orders (referred to as subcontracts in this

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

clause) for materials, services, or facilities;

(3) Terminate all subcontracts;

(4) With approval or ratification to the extent required by the Navy, settle all outstanding liabilities and termination settlement proposals arising from the termination of any subcontracts; any such approval or ratification will be final;

(5) Take any action that may be necessary to protect human health or the environment against imminent and substantial endangerment thereto, or to protect and preserve any Navy-owned property at the ACES, as the Grant Officer may direct; and

(6) Return or cause to be returned to the Navy any funds held by the SFRA or the Escrow Agent not otherwise committed for allowable costs of payment for Environmental Services performed in accordance with this Agreement.

The SFRA agrees to insert such provisions in its contracts, and to require that such provisions be placed in any subsequent subcontracts between the SFRA's contractors and their subcontractors, so as to effect the provisions above.

f. If this Agreement is terminated under this Section 1003, the status of the parties with respect to environmental conditions at the ACES shall revert to as the status that existed immediately preceding the effective date of this Agreement.

g. A party's right to terminate, and any determination of funds available for reimbursement, under this Section 1003 shall be subject to the dispute resolution procedures in Section 1001 above.

### **Section 1004. Effects of Suspension and Termination**

a. Except for allowable costs in accordance with 32 CFR Section 33.22 and the applicable OMB Circulars, any costs to the SFRA resulting from obligations incurred by the SFRA during a suspension, or after termination of payments, are not allowable unless the Navy expressly authorizes them in the notice of suspension or termination, or subsequently authorizes such costs. Any other SFRA costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable only if:

(1) the costs result from obligations which were properly incurred by the SFRA before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and

(2) the costs would be allowable if the Agreement were not otherwise suspended or expired at the end of the funding period in which the termination takes effect.

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
AGREEMENT**

b. The enforcement remedies specified in this section do not relieve the SFRA or its subcontractors from compliance with 32 CFR Section 33.35, Subpart C, or 32 CFR Part 25, including the restrictions on entering into a covered transaction with any party which is debarred, suspended, or is otherwise excluded from, or ineligible for participation in, Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

**Article XI  
LEGAL AUTHORITY**

**Section 1101. Legal Authority**

The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party's abilities to perform its duties under this Agreement.

**IN WITNESS WHEREOF**, and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

**SAN FRANCISCO REDEVELOPMENT AGENCY**

By: \_\_\_\_\_

NAME:

TITLE: Director

Dated: \_\_\_\_\_

**THE UNITED STATES OF AMERICA**

By: \_\_\_\_\_

Mr. Robert Griffin

Assistant Commander for Acquisition, Naval Facilities Engineering Command

Dated: \_\_\_\_\_

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
AGREEMENT**

**APPENDIX 13**

*Agreement to Implement the Conveyance Agreement  
between the United States of America and the San Francisco Redevelopment Agency  
for the conveyance of Hunters Point Naval Shipyard  
with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140  
dated \_\_\_\_\_*

[Separate agreement to implement plan for IR Sites 7/18 and the  
Radiation-Impacted Area around Building 140 that utilizes escrow agent  
and mimics former ETCA section 717]

**KUTAK ROCK LLP**  
**SUITE 1000**  
**1101 CONNECTICUT AVENUE, N.W.**  
**WASHINGTON, D.C. 20036-4374**  
**202-828-2400**  
**FACSIMILE 202-828-2488**  
**www.kutakrock.com**

ATLANTA  
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DENVER  
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OKLAHOMA CITY  
OMAHA  
PHILADELPHIA  
RICHMOND  
SCOTTSDALE  
WICHITA

GEORGE R. SCHLOSSBERG  
george.schlossberg@kutakrock.com  
(202) 828-2418

**MEMORANDUM**

**TO:** JOHN M. CUMMINS, ESQ.  
REX CALLAWAY, ESQ.  
RITA M. LIOTTA, ESQ.

**FROM:** MR. SCHLOSSBERG  
MR. STEINBERG

**DATE:** SEPTEMBER 8, 2009

**RE:** SFRA REVISED EARLY TRANSFER COOPERATIVE AGREEMENT  
DATED 9/8/2009 COVERING PORTIONS OF HUNTERS POINT NAVAL  
SHIPYARD

---

On behalf of the San Francisco Redevelopment Agency ("SFRA"), I am forwarding for your review and comment:

1. a revised draft *Early Transfer Cooperative Agreement* dated 9/8/2009 ("SFRA 9/8 ETCA"), together with a "red-line" version of the document that reflects changes to the Navy draft ETCA dated 2/5/2009 ("Navy 2/5 ETCA") that was the basis of our meeting;
2. a revised draft *Administrative Order on Consent* ("AOC") dated 9/8/2009 ("SFRA 9/8 AOC"), together with a "red-line" version of the document that reflects changes to the original 4/6/2009 version ("4/6 AOC"); and
3. a draft *Agreement to Implement the Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point Naval Shipyard with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140* dated \_\_\_\_\_ ("IR Sites 7/18 Agreement").

The SFRA 9/8/ ETCA (i) reflects changes agreed to at our meeting (e.g. add back AOC, incorporate escrow concept, etc.), (ii) deletes IR sites 7/18 from the body of the ETCA, but addresses IR sites 7/8 through the IR Sites 7/18 Agreement attached as an Appendix to the ETCA, and (iii) has been conformed with the SFRA 9/8 AOC.

**SFRA REVISED EARLY TRANSFER COOPERATIVE AGREEMENT DATED 9/8/2009  
COVERING PORTIONS OF HUNTERS POINT NAVAL SHIPYARD**

September 8, 2009

Page 2.

Please note that the SFRA 9/8 ETCA, SFRA 9/8 AOC and IR Sites 7/18 Agreement have been discussed with the contract developer for the property and the three (3) documents contain the consolidated comments of the SFRA and the developer.

Please distribute the SFRA 9/8 ETCA, SFRA 9/8 AOC and IR Sites 7/18 Agreement as appropriate among the Navy team so we can jointly determine how best to proceed. If you have any questions or concerns, please call me directly at 202-828-2418 or contact me by email at [george.schlossberg@kutakrock.com](mailto:george.schlossberg@kutakrock.com).

G.R.S.

Enclosures: as stated.

cc. w/ encl.: Michael Cohen, Esq.  
Elaine Warren, Esq.  
James Morales, Esq.  
Celena Chen, Esq.  
Ms. Tiffany Bohee  
Mr. Thor Kaslofsky  
Ms. Amy Brownell  
Gordon Hart, Esq.

12/11/2020

Confidential  
Confidential

IN THE MATTER OF  
FORMER HUNTER'S POINT NAVAL SHIPYARD

Respondents

San Francisco Redevelopment Agency and HPS Development Co., LP  
[who is Lennar's entity?]

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HUNTER'S POINT NAVAL SHIPYARD  
U.S. EPA Region 9

CERCLA Docket No.

Proceeding under Sections 104, 106 and 122 of the Comprehensive Environmental Response,  
Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606, and 9622.

DRAFT FOR DISCUSSION PURPOSES ONLY DO NOT CITE, QUOTE OR RELEASE

Error! Unknown document property name.

4845-3317-7604.2



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**ADMINISTRATIVE ORDER ON CONSENT  
FOR CLEANUP OF PORTIONS OF FORMER HUNTER'S POINT SHIPYARD**

**I. JURISDICTION**

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA" the California Department of Toxic Substances Control ("DTSC"), the California Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB"), and the San Francisco Redevelopment Agency ("SFRA") and HPS Development Co. LP[who is this?] (referred to individually as "Respondent" and collectively as "Respondents"). The Order concerns the preparation and performance of one or more remedial designs and remedial actions ("RD/RA") for certain hazardous substances, pollutants, or contaminants present on Parcels G, and portions of Parcel B at the former Hunter's Point Naval Shipyard ("HPS") located at San Francisco ("Site," described in Appendix A and depicted generally on the map attached as Appendix B) and the reimbursement for future response costs incurred by EPA, DTSC and RWQCB in connection with such CERCLA response actions. [no reason to include FOST property in AOC]

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606 and 9622 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator of EPA Region 9 to the Superfund Branch Chief by Regional Delegation R9 1290.15, dated September 29, 1997. DTSC and the RWQCB sign this Order pursuant to relevant provisions of CERCLA Section 120 regarding state participation in federal facility cleanups, and Section 121(f), 42 U.S.C. §§ 9620 and 9621(f), and applicable provisions of 40 C.F.R. Subpart F, and the California Health and Safety Code, Division 20, Chapters 6.5, 6.67, 6.75, and 6.8, and the California Water Code, Division 7. The United States Department of Justice is approving and signing this Order pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States.

3. Pursuant to that certain Early Transfer Cooperative Agreement ("ETCA") Covering Portions of the Hunters Point Naval Shipyard Between the United States of America Department of the Navy ("Navy") and the SFRA dated \_\_\_\_, and pursuant to that certain Remediation Agreement dated \_\_\_\_ between the SFRA and HPS Development Co., Respondents have agreed to undertake the cleanup of a portion (the "Site") of the former Hunter's Point Naval Shipyard, which Site is more specifically depicted in Appendix A to this Order. This cleanup is currently being undertaken by the U.S. Navy pursuant to the terms of the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992 ("FFA"). The FFA is being amended to provide in

general that the obligations of the Navy to conduct that portion of the cleanup of the Site that SFRA has agreed to perform under the ETCA will be suspended so long as the Respondents comply with all requirements of this Order and other conditions described in the Amended FFA are met [NOTE: SUBJECT TO REVIEW AND CONSENT OF AMENDED FFA TERMS]. In the event that EPA, in consultation with DTSC and RWQCB, shall determine that the Respondents are in Default as defined in Section XXXII of this Order, the responsibility for any remaining response actions at the Site shall be undertaken by the Navy in accordance with the terms and conditions of the Amended FFA.

4. Respondents represent that they are each bona fide prospective purchasers ("BFPP") with respect to the Site as defined by section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that it has and will continue to comply with section 101(40) during its ownership of the Site, and thus qualify for the protection from liability under CERCLA set forth in section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Site. In view, however, of the complex nature and significant extent of the Work to be performed by Respondents at the Site, and the risk of claims under CERCLA being asserted against Respondents notwithstanding section 107(r)(1) as a consequence of Respondents' activities at the Site pursuant to this Order, one of the purposes of this Order is to resolve, subject to the reservations and limitations contained in Section XXVI (Reservations of Rights by EPA), any potential liability of Respondents under CERCLA for Existing Contamination, as defined in Paragraph 13 below.

5. EPA, DTSC, RWQCB and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the Findings of Fact, and Conclusions of Law and Determinations in Sections V and VI of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

6. This Order applies to and is binding upon EPA, DTSC, RWQCB and upon Respondents and their successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall not alter Respondents' responsibilities under this Order, except as provided in Paragraph 20.

7. Each Respondent shall be responsible for carrying out the activities required of it by the Scope of Work and this Order in a timely manner and shall be subject to stipulated penalties for its failure to meet the terms and conditions of this Order. **A Respondent may be held responsible for carrying out activities required of the other Respondent under the Scope of Work and this Order, but only after EPA, DTSC**

**and RWQCB, have exhausted their remedies under this Order against the non-performing Respondent. Where this Order specifies that Respondents have a right or duty, but does not specify which respondent has that right, the Respondents may designate a single Respondent to exercise that right or perform that duty.**

8. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order by its contractors, subcontractors and representatives.

9. The undersigned representative of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to execute and legally bind Respondents to this Order.

### **III. STATEMENT OF PURPOSE**

10. In entering into this Order, the objectives of EPA, DTSC, RWQCB and Respondents, in addition to the purpose identified in Paragraph 4 above, are: (a) to provide for the design, construction and implementation of the selected remedial action consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), including the obligation to implement and maintain institutional controls, including land use covenants, or operation and maintenance at the Site to achieve all applicable or relevant and appropriate requirements not waived ("ARARs"), and other Performance Standards described in the RODs; (b) to provide for the payment of response and oversight costs incurred by EPA, DTSC and RWQCB with respect to this Order, provided that neither EPA, DTSC, nor the RWQCB will seek reimbursement from Respondents for any response and oversight costs already paid to them from a Department of Defense funding source; and (c) to fulfill a portion of the required assurances under the CERCLA 120(h)(3)(C) covenant deferral process.

12. The Work conducted under this Order is subject to approval by EPA, after consultation with DTSC and RWQCB. For purposes of this Order, consultation with DTSC and RWQCB shall include, but not be limited to, simultaneous receipt by and a reasonable opportunity to review and comment on by DTSC and RWQCB of documents and deliverables )) required to be submitted by Respondents under this Order (the reasonable review time for each document/deliverable will be determined by EPA in consultation with DTSC, the RWQCB and Respondents before or upon receipt of the document/deliverable, provided, however, that the reasonable review time shall be as soon as practicable); opportunity to participate in all meetings among the Parties concerning the Site; and to participate in dispute resolution as provided by Sections XXII and XXIII of this Order. Respondents shall conduct all Work under this Order in compliance with CERCLA, the NCP, and all applicable EPA guidance, policies, and procedures and applicable State law.

#### *IV. Definitions*

13. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Amended FFA” shall mean Amendment No. 1 to the Hunter’s Point Naval Shipyard Federal Facilities Agreement, dated \_\_\_\_\_.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

“Certification of Completion of Remedial Action” shall mean a certification issued for ROD Implementation Area (defined below) pursuant to paragraph 63c or a certification for the entire Site issued pursuant to paragraph 63d.

“Certification of Completion of the Work” shall mean a certification issued for ROD Implementation Area (defined below) pursuant to paragraph 65c or a certification for the entire Site issued pursuant to paragraph 65d.

“Covenant Deferral Request” shall mean the document prepared in accordance with CERCLA Section 120(h)(3)(C), which provides the basis for the deferral by EPA, with the concurrence of the State, of the CERCLA covenant with respect to the Site.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or State or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

"DTSC" shall mean the Department of Toxic Substances Control and any successor departments or agencies of the State.

“DTSC Future Response Costs” shall mean all reasonable costs, including, but not limited to, direct and indirect costs, that DTSC incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, costs to establish or implement institutional controls, , costs for emergency response, or the costs incurred by DTSC in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order "Effective Date" shall be the effective date of this Order as provided in Section XXXX.

Environmental Insurance Policies shall mean the environmental insurance

policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"EPA Future Response Costs" shall mean all reasonable costs, including, but not limited to, direct and indirect costs, that the EPA incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of establishing and maintaining the administrative record, or participating in community relations meetings, the costs to establish or implement Institutional Controls, costs for emergency response, or the costs incurred by EPA in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order

"ETCA" shall mean the Environmental Transfer Cooperative Agreement entered into by Navy, the San Francisco Redevelopment Authority, San Francisco, California for the Site, dated \_\_\_\_, and attached hereto as Exhibit \_\_\_\_.

"Existing Contamination" shall mean:

- 1) any hazardous substances, pollutants or contaminants present or existing on or under the Site as of the Effective Date;
- 2) any hazardous substances, pollutants or contaminants that migrated from the Site prior to the Effective Date; and

Existing Contamination includes, but is not limited to, Navy-Retained Conditions.

"FFA" shall mean the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992.

"Health and Safety Plan" shall mean a plan for how the Work will be conducted in a manner that protects the health and safety of workers and occupants at the Site and which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

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"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"Institutional Controls" shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

"Known Conditions" shall mean those environmental conditions at the Site set forth in Appendix D (Known Conditions Documentation) and includes ~~"Reasonably Expected Environmental Conditions" as defined in Section 221 below. The term "Known Conditions" does not~~ a contaminant at a site that is, based upon the state of scientific knowledge at the time this Agreement is executed, a scientifically-accepted "break-down" or "daughter" or "parent" of a contaminant identified in Appendix D as being present at that respective site . Notwithstanding any environmental conditions set forth in Appendix 3, or associated "break-down," "daughter," or "parent" product , in no event shall the term "Known Conditions" include ~~"Navy-Retained Conditions"~~ as defined below..APPENDIX D SUBJECT TO FINAL REVIEW AND APPROVAL]"Hunter's Point Naval Shipyard Special Account" shall mean the special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

"National Contingency Plan" or ANCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action(s) as required by EPA, in consultation with DTSC and RWQCB, pursuant to this Order subsequent to and a condition of Completion of Remedial Action.

"Order" shall mean this Administrative Order on Consent, the SOW, all appendices attached hereto (listed in Section XXXVI) and all documents incorporated by reference into this document, including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Order upon approval by EPA. In the event of conflict between this Order and any appendix or other incorporated documents, this Order shall control.

"Paragraph" shall mean a portion of this Order identified by an Arabic numeral or an upper case letter.

"Parties" shall mean EPA, DTSC, RWQCB and the Respondents.

"Performance Standards" shall mean the remedial action objectives set forth in the ROD(s) for Parcel B and Parcel G.

"Petroleum Corrective Action Plan" or "PCAP" shall mean that certain Petroleum Corrective Action Plan for Parcel B issued by the RWQCB and dated \_\_\_\_\_. *{NOTE: Is it correctv that ther is no PCAP for Parcel G?}* The term " Petroleum Corrective Action Plan" or "PCAP " shall not include any amendment, modification or supplement to the above-referenced Petroleum Corrective Action Plan except to the extent required as the result of any negligent act or omission of Respondents or their contractors

"Site".

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. " 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

"Record of Decision(s)" or "ROD(s)" shall mean that certain CERCLA Amended Record of Decision for Parcel B dated \_\_\_\_\_ and that certain CERCLA Record of Decision for Parcel G dated \_\_\_\_\_. including all attachments thereto. The term "Record of Decision(s)" or "ROD(s)" shall not include any amendment, modification or supplement to the above-referenced Records of Decision except to the extent required as the result of any negligent act or omission of Respondents or their contractors. [If not attributable to Respondents' negligence or omission, this would be Navy Retained].

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Respondents to implement each of the RODs in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA, after consultation with DTSC and RWQCB.

"Remedial Action Work Plan" shall mean the document(s) developed pursuant to Paragraph 29 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.

"Remedial Design" shall mean those activities to be undertaken by the Respondents to develop the final plans and specifications for the Remedial Action(s) pursuant to the Remedial Design Work Plan(s).

"Remedial Design Work Plan" shall mean the document(s) developed pursuant to Paragraph 28 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.

"Navy-Retained Conditions" means any condition or cost associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; Radiological Materials; and ~~Unknown~~ Uninsured Unknown Conditions. The term shall also include (i) the performance of CERCLA five-year reviews for years 2013, 2018, 2023 and 2028 for remedies selected in a CERCLA ROD issued by the Navy, (ii) any other activity identified as the responsibility of the Navy in the Amended FFA, and (iii) any change to the requirements in the CERCLA RODs, PCAP, or AOC set forth in an Explanation of Significant Differences under CERCLA or a ROD amendment or a PCAP amendment (or any other change required by the Regulatory Agencies to the requirements in the CERCLA RODs, PCAP or AOC), to the extent the costs associated with such change are not covered by the Insurance Policies or are not attributable to the negligence or omission of Respondents; to the extent such changes are the result of negligent acts or omissions of the Navy or parties acting on behalf of the Navy, such costs are Navy Retained Conditions even if covered by the Insurance Policies; to the extent such changes are the result of negligent acts or omissions by the City or parties acting on behalf of the City, such costs are not Navy Retained Conditions, even if they are not covered by the Insurance Policies.

1) ;



“ROD Implementation Area” shall mean the portions of Parcels B and G identified in Exhibit \_\_\_\_, attached hereto, as that Exhibit may be amended from time to time with the approval of EPA, in consultation with DTSC and the RWQCB, which form the geographic units for which Respondents will seek certification of completion pursuant to Section XVII

“RWQCB” shall mean the Regional Water Quality Control Board, San Francisco Bay Region, and any successor agencies of the State.

“RWQCB Future Response Costs” shall mean all reasonable costs, including, but not limited to, direct and indirect costs, that the RWQCB incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, costs to establish or implement institutional controls, , costs for emergency response, or the costs incurred by the RWQCB in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order

"Section" shall mean a portion of this Order identified by a Roman numeral.

“Site” shall mean that portion of the Hunter’s Point Naval Shipyard Superfund Site which Respondents have agreed to remediate in accordance with this Order, encompassing Site totaling approximately \_\_\_\_ acres, described in Appendix A and depicted generally on the map attached as Appendix B. It is the intent of the Parties that the scope of the “Site” shall be the same as the “Area Covered by Environmental Services” as that term is defined in the ETCA

"State" shall mean the State of California.

“State Interest” shall mean the interest rate applied to outstanding payments for costs billed pursuant to California Health and Safety Code section 25360.1. The rate of interest is subject to change.

"Statement of Work" or "SOW" shall mean the statement of work required of each Respondent for implementation of one or more Remedial Design(s) and Remedial Action(s) and the PCAP for the Site, as set forth in Appendix C to this Order and any modifications made in accordance with this Order. The Statement of Work shall identify , for each element of Work, which Respondent is responsible for performing that element.

"Supervising Contractor" shall mean the principal contractor retained by the Respondents to supervise and direct the implementation of the Work under this Order.

"United States" shall mean the United States of America.

“Insured Unknown Conditions” shall mean those environmental conditions at the

Site that are not Known Conditions and are within the insurance coverage grant of, and for which, and to the extent, Respondents are ~~insured and~~ paid pursuant to, the Environmental Insurance Policies. This term also includes a specific Unknown Condition that otherwise would have been an ~~Unknown~~ Insured Unknown Condition but for which coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies. ~~— (“Excluded Unknown~~ Insured Unknown Condition”). The term “Insured Unknown Conditions” shall ~~be limited~~ include Excluded Unknown Insured Conditions only to the extent of specific costs ~~which that~~ would have otherwise been funded by the Environmental Insurance Policies but for such failure of the SFRA or the named insured.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (4) any "hazardous waste" under California Health and Safety Code section 25117, or "hazardous substance" under California Health and Safety Code section 25316; and (5) any "waste" under California Water Code section 13050.

"Work" shall mean the activities with respect and limited to Known Conditions and Unknown Insured Conditions that each Respondent is required to perform under this Order, except (1) those required by Section XXXIV (Retention of Records) (2) those aspects of a remedy which, after installation and implementation, require only periodic monitoring, inspection, enforcement, maintenance and repair. and (3) such further response actions selected pursuant to paragraph 37, except to the extent necessitated by the acts or omissions of Respondents.

## V. FINDINGS OF FACT

14. Hazardous substances that have been released or that have the potential to be released within the Site include, but may not be limited to \_\_\_\_\_ which currently pose potential long-term risks to human health or the environment.

On January 22, 1992, the EPA, State of California Department of Health Services ("DHS") (now DTSC), and the Navy entered into a Federal Facilities Agreement requiring the Navy to identify, perform and complete all necessary response actions, including operation and maintenance at the former Hunter's Point Naval shipyard under CERCLA.

The Site contains \_\_\_\_ known Installation Restoration Program sites ("IRP Sites"). The Navy has signed a Record of Decision and an Amended Record of Decision to select a remedy for the IRP sites.

The former Hunter's Point Naval Shipyard was selected in 1992 for Base Realignment and Closure and was officially closed in \_\_\_\_\_.

The SFRA has requested an early transfer of the Site, which it has or will acquire, upon EPA's approval of and the State's concurrence on the Covenant Deferral Request. Except for the remediation of areas containing only petroleum constituents, all of the response actions undertaken by Respondents shall be performed under this AOC, as determined by EPA, with DTSC and RWQCB concurrence, pursuant to CERCLA and the NCP.

## **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

15. Based on the Findings of Fact set forth above, and the Administrative Record supporting this Order, EPA has determined that:

a. The former Hunter's Point Naval Shipyard is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and Waste Materials as defined in Section IV of this Order.

c. Respondents are each "persons" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. The conditions described in Paragraph 14 above constitute an actual or threatened release of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or a release of Waste Material, as defined in Section IV of this Order.

e. The response actions required by this Order are necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VII. ADMINISTRATIVE ORDER**

16. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondents shall comply with the provisions of this Order, including, but not limited to, all appendices to this Order and all documents incorporated by reference into this Order.

## **VIII. GENERAL PROVISIONS**

17. Commitments by Respondents.

Respondents shall be obligated to finance, through the grant funds provided by the Navy pursuant to the ETCA and any proceeds from the Environmental Insurance Policies, and shall perform the Work in accordance with this Order, the SOW, the Records of Decision, the PCAP and other decision documents applicable to the Site and associated with the Records of Decision, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Respondents and approved by EPA, in consultation with DTSC and RWQCB, pursuant to this Order. Respondents shall also reimburse EPA, DTSC and RWQCB for their respective Future Response Costs as provided in this Order.

18. Compliance with Applicable Law.

All activities undertaken by the Respondents pursuant to this Order shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Respondents must also comply with all applicable or relevant and appropriate requirements of federal and state environmental laws as set forth in the ROD(s) and the SOW. The activities conducted pursuant to this Order, if approved by EPA, shall be considered to be consistent with the NCP.

19. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work) and where such remedial action is selected and carried out in compliance with Section 121 of CERCLA. Where any portion of the Work that is not on Site requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain all such permits and approvals.

b. The Respondents may seek relief under the provisions of Section XXI (Force Majeure) of this Order for any delay in the performance of the Work resulting from a failure to obtain, or delay in obtaining, any permit required for the Work.

c. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

20. Conveyance of Site.

a. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests and leasehold interests (in excess of 20 years) Respondents shall give written notice to EPA, DTSC, and RWQCB of the proposed conveyance, including the name and address of the grantee. Nothing in this Order shall be construed to require Respondents to secure the approval of EPA, DTSC, or RWQCB before transferring such interest

b. In the event of any such conveyance, Respondent's obligations under this Order, except obligations to implement institutional controls pursuant to Section IX (Access and Institutional Controls) of this Order, if the responsibility for implementing such institutional controls has been transferred to the subsequent owner in an agreement enforceable by Respondents and this Order, shall continue to be met by Respondents except as provided herein. In no event shall the conveyance otherwise release or otherwise affect the liability of Respondents to comply with all provisions of this Order, absent the prior written consent of EPA, DTSC, and RWQCB. EPA's, DTSC's, and RWQCB's decisions under Paragraph 20.b. are in their sole discretion and shall not be subject to dispute resolution or judicial review. EPA will consider the following criteria, among others, in approving or disapproving a proposed successor for the Work under this Order: (i) the technical qualifications of the successor, or its proposed consultant, to perform remaining Work obligations; (ii) financial ability to perform such obligations; (iii) the successor's legal status and legal authority to sign the Order; (iv) the proposed successor's willingness to sign the Order without modification; and (v) assurance that the proposed transfer of Work obligations will not hinder or delay completion of the Work. If EPA, DTSC, and RWQCB approve a successor for the Work under this Order, EPA, DTSC, and RWQCB may also provide covenants not to sue for the successor similar to those provided in Paragraphs 95 and 98 of this Order.

c. **[NOTE: This section is unnecessary because a covenant will be recorded at the time of transfer from the Navy.]**

## **IX. PERFORMANCE OF THE WORK BY RESPONDENTS**

### **21. Selection of Supervising Contractor.**

a. All aspects of the Work to be performed by the Respondents pursuant to Sections IX (Performance of the Work by Respondents), X (Remedy Review), XI (Quality Assurance, Sampling and Data Analysis), and XVIII (Emergency Response) of this Order shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA, after consultation with DTSC and RWQCB. Respondent CP Development Co. [who is this?] has proposed to use MACTEC as its Supervising Contractor and provided EPA, DTSC and RWQCB with the information meeting the criteria described in subparagraph b. below, including its qualifications and Quality Management Plans. [NOTE: Subject to such information being provided and reviewed] MACTEC is not disapproved.

b. If at any time in the future, Respondents propose to change its Supervising Contractor, Respondents shall notify EPA, DTSC and RWQCB in writing at least sixty (60) days in advance of such change, and must obtain an authorization to proceed from EPA, after consultation with DTSC and RWQCB, before the new Supervising Contractor performs, directs, or supervises any Work under this Order. Respondents must provide the name, title, and qualifications of any contractor proposed

to be Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/241/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA, after consultation with DTSC and RWQCB, will issue a notice of disapproval or an authorization to proceed.

c. If EPA disapproves a proposed Supervising Contractor, EPA will notify Respondents in writing. Respondents shall submit to EPA, DTSC and RWQCB a list of contractors, including the qualifications of each contractor that would be acceptable to them, within 30 days of receipt of EPA's disapproval of the contractor previously proposed. After consultation with DTSC and RWQCB, EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Respondents may select any contractor from that list that is not disapproved and shall notify EPA, DTSC and RWQCB of the name of the contractor selected within 21 days of EPA's authorization to proceed.

d. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Respondents from meeting one or more deadlines in a plan approved by the EPA pursuant to this Order, Respondents may seek relief under the provisions of Section XXI (Force Majeure).

22 Remedial Design. With respect to each remedial design, the following procedures and requirements shall apply. **[NOTE: TIMELINES SUBJECT TO FURTHER REVIEW]**

a. With respect to the Records of Decision, within 21 days of the Effective Date of this Order, Respondents shall provide EPA, DTSC and RWQCB with a schedule for the remedial design ("RD") and performance of the Remedial Action ("RA") to implement the Records of Decision. If EPA, after consultation with DTSC and RWQCB, does not approve the schedule, Respondents shall be so advised and Respondents shall either revise the schedule or invoke the dispute resolution provisions of Section XXIII with respect to the schedule only, not the remedy selected.

b.

c. With respect to the Records of Decision, within 60 days following the approval of the schedules above, the Respondents shall submit to EPA, DTSC and RWQCB a work plan for the design of the applicable Remedial Action at the Site

("Remedial Design Work Plan" or "RD Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the applicable ROD and for achievement of the Performance Standards and other requirements set forth in the ROD, this Order and the SOW. Upon its approval by EPA, after consultation with DTSC and RWQCB, the Remedial Design Work Plan shall be incorporated into and become enforceable under this Order.

d. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan ("RD QAPP") in accordance with Section XI (Quality Assurance, Sampling and Data Analysis)); (2) a Construction Quality Assurance Plan; (3) a treatability study; (4) a Pre-design Work Plan; (5) a preliminary design submittal; (6) an intermediate design submittal; (7) a pre-final/final design submittal; and (8) other plans as described in the SOW including a Health and Safety Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120. In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

e. Upon approval of the Remedial Design Work Plan by EPA, after consultation with DTSC and RWQCB, and submittal of the Health and Safety Plan for all field activities to EPA, DTSC and RWQCB, Respondents shall implement the Remedial Design Work Plan. The Respondents shall submit to EPA, DTSC and RWQCB all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Respondents shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

f. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling and pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule.

g. The intermediate design submittal, if required by EPA or if independently submitted by the Respondents, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.

h. The pre-final/final design submittal shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan ("CQAPP"); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official ("QA Official"), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.

i. Respondents may request EPA approval that the Remedial Design Work Plan and Remedial Action Work Plan be combined. Any combined Work Plan shall include all information described in Paragraphs 28 and 29 of this Section unless omissions are approved by EPA after consultation with DTSC and RWQCB.

j. Within 60 days of the Effective Date of this Order or EPA's signature of any ROD for the Site, whichever is later, Respondents shall submit an Institutional Controls Implementation and Assurance Plan applicable to the ROD to EPA for review and approval, after consultation with DTSC and RWQCB, in accordance with the SOW.

29. Remedial Action. With respect to each remedial action, the following procedures and requirements shall apply:

a. Within 60 days after the approval of the final design submittal, Respondents shall submit to EPA, DTSC and RWQCB a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the relevant ROD and achievement of the Performance Standards, in accordance with the ROD, this Order, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA after consultation with DTSC and RWQCB. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Order. At the same time as the Remedial Action Work Plan is submitted, Respondents shall submit to EPA, DTSC and RWQCB a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements, including but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following: (1) schedule for completion of the Remedial Action; (2) schedule for developing and submitting other required Remedial Action plans; (3) methods for satisfying permitting requirements (4) methodology for implementation of the Operation and Maintenance Plan; (5) methodology for implementation of the Contingency Plan; (6) tentative formulation of the Remedial Action team; (7) construction quality control plan (by constructor); and (8) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include the methodology for implementation of the Construction Quality Assurance Plan and a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Respondents's Remedial Action Project Team (including, but not limited to, the Supervising Contractor). [TO BE FURTHER REVIEWED]

c. Upon approval of the Remedial Action Work Plan by EPA, after consultation with DTSC and RWQCB, Respondents shall implement the activities required under the Remedial Action Work Plan. The Respondents shall submit to EPA, DTSC and RWQCB all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Respondents shall not commence



physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

30. The Respondents shall continue to implement the Remedial Action and Operation and Maintenance until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Order and the ROD.

31. Respondents acknowledges and agrees that nothing in this Order, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by EPA, DTSC or RWQCB that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

[32. Certain areas of the Site contain petroleum constituents, but for which no hazardous substances, pollutants, or contaminants have been identified. The Parties agree that CERCLA does not apply to [If CERCLA does not apply, should the PCAP work be performed pursuant to this Order?] and that this site will be remediated in compliance the PCAP. If EPA determines that any other discrete area of the Site, which has been determined to contain petroleum constituents, does not contain hazardous substances, pollutants, or contaminants, EPA will notify the RWQCB and DTSC. The RWQCB may require Respondents to investigate, cleanup, or abate such discharges of petroleum under a separate agreement or order between the RWQCB and Respondents.

33. Respondents is not required to perform any Work under this Order on any property that is outside the boundaries of the Site.

34. Waste Shipments.

a. For any Work performed under this Order, Respondents shall comply with all applicable State waste management laws.

b. For any Work performed under this Order, Respondents shall, prior to any shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA, DTSC and RWQCB Project Coordinators of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments to out-of-state waste management facilities when the total volume of all such shipments will not exceed 10 cubic yards.

c. The Respondents shall include in the written notification for out-of-state waste shipments the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

d. The identity of the receiving facility and state will be determined by the Respondents following the award of the contract for Removal Action or Remedial Action construction. The Respondents shall provide the information required by Paragraph 32.c. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

35. Off-Site Waste Shipments. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. If the off-Site location is in California, Respondents shall obtain certification from the State that the proposed receiving facility is in substantial compliance with California laws. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provisions and regulations cited in the preceding sentences.

## *X. Remedy Review*

### *36. Periodic Review.*

For the duration of this Order, Respondents shall conduct studies and investigations as reasonably requested by EPA, after consultation with DTSC and RWQCB, in order to permit EPA and/or the Navy to conduct reviews of whether any Remedial Action(s) is(are) protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

### *37. Selection of Further Response Actions.*

If EPA determines, at any time, after consultation with DTSC and RWQCB, that any Remedial Action at the Site is not protective of human health and the environment, EPA, with the Navy's concurrence, may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP ("Further Response Actions"). [What is the consequence if Navy does not concur?]

a. Opportunity to Comment. For the duration of this Order, Respondents and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA and to submit written comments for the record during the comment period.

b. Limitations on Respondents's Obligation to Perform Further Response Actions. If EPA selects Further Response Actions for the Site, the Respondents shall have no obligation to undertake such Further Response Actions except to the extent that such Actions are required as a direct result of Respondents' negligent act or omission, and in no event shall Respondents be obligated to perform to the extent that such Actions are required as a result of Navy-Retained Conditions. Any requirement that Respondents undertake Further Response Actions shall be subject to Respondents's right to dispute resolution in accordance with Section XXIII. Disputes pertaining to whether any Remedial Action is protective or to EPA's selection of further response

actions shall be resolved based on the administrative record supporting the decision.

c. Submissions of Plans. If Respondents is required to perform further response actions pursuant to Paragraph 37.b., Respondents shall submit a plan for such work to EPA for approval, in accordance with the procedures set forth in Section IX (Performance of the Work by Respondents) and shall implement the plan approved by EPA, after consultation with DTSC and RWQCB, in accordance with the provisions of this Order.

## **XI. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS**

38. Respondents shall use quality assurance, quality control, and chain of custody procedures for all assessment, characterization, treatability, design, compliance and monitoring samples in accordance with "Uniform Federal Policy for Quality Assurance Project Plans (UFP-QAPP) (EPA/505/B-04-900A, March 2005), "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Respondents of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Order, Respondents shall submit to EPA for approval, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and relevant guidance. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Order. Respondents shall ensure that EPA, DTSC and RWQCB personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Respondents in implementing this Order. In addition, Respondents shall ensure that such laboratories shall analyze all samples submitted by EPA, DTSC or RWQCB pursuant to the QAPP for quality assurance monitoring. Respondents shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Order perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988 (collectively, "CLP-approved methods"), and any amendments made thereto during the course of the implementation of this Order; however, upon approval by EPA, after consultation with DTSC and RWQCB, the Respondents may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Respondents shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Order participate in an EPA or EPA-equivalent QA/QC program. Respondents shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995),

and AEPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA after consultation with DTSC and RWQCB. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Respondents shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Order will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

39. Upon request, the Respondents shall allow split or duplicate samples to be taken by EPA, DTSC or RWQCB or their authorized representatives. Respondents shall notify EPA, DTSC and RWQCB not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA, after consultation with DTSC and RWQCB. In addition, EPA, DTSC and RWQCB shall have the right to take any additional samples that they deem necessary. Upon request, EPA shall allow the Respondents to take split or duplicate samples of any samples it takes as part of the EPA's oversight of the Respondents' implementation of the Work.

40. Respondents shall submit to EPA, DTSC and RWQCB two copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Respondents with respect to the Site and/or the implementation of this Order unless EPA agrees otherwise, after consultation with DTSC and RWQCB.

41. Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

## **XII. ACCESS AND INSTITUTIONAL CONTROLS**

***42. AS REQUIRED IN THE COVENANT DEFERRAL PROCESS, CERTAIN RESTRICTIONS ON LAND/SOIL AND GROUNDWATER USE ARE NEEDED TO ASSURE PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT AT THE TIME OF TRANSFER OF THE SITE, AND PRIOR TO AND DURING THE IMPLEMENTATION OF RESPONSE ACTIONS AT THE SITE. ACCORDINGLY, THE NAVY, DTSC AND RWQCB HAVE PREPARED, IN CONSULTATION WITH RESPONDENTS, LAND USE COVENANTS ("LUCs") CONSISTENT WITH THE REQUIREMENTS OF THE RODs FOR PARCELS B AND G. RESPONDENTS SHALL REFRAIN FROM USING THE SITE IN ANY MANNER THAT WOULD INTERFERE WITH OR ADVERSELY AFFECT THE IMPLEMENTATION, INTEGRITY, OR PROTECTIVENESS OF REMEDIAL MEASURES AND RESPONSE ACTIONS TO BE PERFORMED PURSUANT TO THIS ORDER AND/OR IN ACCORDANCE WITH THE RODs.***

**A. RESPONDENTS SHALL COMPLY WITH THE USE RESTRICTIONS  
SELECTED IN THE RODS AND SHALL COMPLY WITH THE RESTRICTIONS FOUND IN  
APPENDIX G PRIOR TO IMPLEMENTATION OF THE RODS.:**

43. As of the Effective Date of this Order, if the Site is owned or controlled by Respondents, Respondents shall: provide the United States, including EPA and the Navy, and DTSC and RWQCB, and their representatives and contractors, with access at all reasonable times to the Site, for the purpose of conducting any activity related to this Order including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to EPA, DTSC and RWQCB;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for planning or implementing response actions or additional response actions at or near the Site;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;
- (7) Implementing any response actions or the Work in the event of Default by Respondents;
- (8) Inspecting and copying records, operating logs, contracts or other documents maintained or generated by Respondents or its agents, consistent with Section XXXIII (Access to Information);
- (9) Assessing Respondents's compliance with this Order; and
- (10) Determining whether the Site or Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted by, or pursuant to this Order.

46. If EPA determines, after consultation with DTSC and RWQCB, that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement any remedies selected in the RODs, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Respondents shall cooperate with EPA's efforts to secure such governmental controls.

47. Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statutes or

regulations.

### **XIII. REPORTING REQUIREMENTS**

48. In addition to any other requirement of this Order, Respondents shall submit two copies of written monthly progress reports to EPA, DTSC and RWQCB that: (a) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Respondents or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Order completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Respondents has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Respondents shall submit these progress reports to EPA, DTSC and RWQCB by the tenth day of every month following the Effective Date of this Order until EPA notifies the Respondents pursuant to Section XVII (Certification of Completion). If requested by EPA, DTSC or RWQCB, Respondents shall also provide briefings for EPA, DTSC and RWQCB to discuss the progress of the Work.

49. The Respondents shall notify EPA, DTSC and RWQCB of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

50. Upon the occurrence of any event during performance of the Work that is required to be reported pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act ("EPCRA"), the Respondent owning the property where the event occurred shall within 24 hours of the onset of such event orally notify the EPA, DTSC and RWQCB Project Coordinators or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 9, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

51. Within 20 days of the onset of such an event, the Respondent owning the property where the event occurred shall furnish to EPA, DTSC and RWQCB a written report, signed by that Respondent's Project Coordinator, setting forth the events which

occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, that Respondent shall submit a report setting forth all actions taken in response thereto.

52. Each Respondent shall submit two copies of all plans, reports, and data required by the SOW, each Remedial Design Work Plan, each Remedial Action Work Plan, or any other document which that respondent is required to submit under the Scope of Work to EPA in accordance with the schedules set forth in such plans. The submitting respondent shall simultaneously submit two copies of all such plans, reports and data the respondent is required to submit under the Scope of Work to DTSC and RWQCB. Upon request by EPA, DTSC or RWQCB, the submitting Respondents shall submit in electronic form all portions of any report or other deliverable Respondents are required to submit pursuant to the provisions of this Order.

53. All reports and other documents submitted by Respondents to EPA, DTSC and RWQCB (other than the monthly progress reports referred to above) which purport to document Respondents's compliance with the terms of this Order shall be signed by an authorized representative of the Respondents.

#### **XIV. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

54. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Order, EPA, after consultation with DTSC and RWQCB, shall, as soon as practicable: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the submitting Respondent modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing the submitting Respondent at least one notice of deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

55. In the event of approval, approval upon specified conditions, or modification by EPA, pursuant to Paragraph 54(a), (b), or (c), the submitting Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to Respondents's right to invoke the Dispute Resolution procedures set forth in Section XXIII (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 54(c) and the submission has a material defect that indicates a bad faith lack of effort to submit an acceptable deliverable, EPA retains its right to seek stipulated penalties, as provided in Section XXIV (Stipulated Penalties).

56. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 52(d), the submitting Respondentshall, within thirty (30) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXIV, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph 54.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 54, the submitting Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XXIV (Stipulated Penalties).

57. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, after consultation with DTSC and RWQCB, EPA may again require the submitting Respondent to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to reasonably modify or develop the plan, report or other item. The submitting Respondent shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XXIII (Dispute Resolution).

58. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, and the resubmission under consideration indicates a bad faith lack of effort to submit an acceptable deliverable, Respondents may, in the sole discretion of EPA, be deemed to have failed to submit such plan, report, or item timely and adequately unless the Respondents invokes the dispute resolution procedures set forth in Section XXIII (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XXIII (Dispute Resolution) and Section XXIV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, and the resubmission under consideration indicates a bad faith lack of effort to submit an acceptable deliverable, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXIV. Otherwise, stipulated penalties shall accrue from the date on which the resubmitted plan, report or item is disapproved or modified by EPA.

59. All plans, reports, and other items required to be submitted to EPA, DTSC and RWQCB under this Order shall, upon approval or modification by EPA, be enforceable under this Order. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Order, the approved or modified portion shall be enforceable under this Order.

## **XV. PROJECT COORDINATORS**

60. Within 20 days of the Effective Date of this Order, each Respondent, DTSC, RWQCB and EPA will notify each other, in writing, of the name, address and telephone



number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Respondents' Project Coordinators shall be subject to disapproval by EPA, in consultation with DTSC and RWQCB, and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Respondents's Project Coordinators shall not be attorneys for the Respondents in this matter. They may assign other representatives, including other contractors, to serve as a representative for oversight of performance of daily operations during remedial activities.

61. EPA, DTSC and RWQCB may designate other representatives, including, but not limited to EPA, DTSC and RWQCB employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Order. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Order and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material. EPA's Project Coordinator, DTSC's Project Coordinator, RWQCB's Project Coordinator and the Respondents' Project Coordinators will meet, at a minimum, on a monthly basis.

## **XVI. Assurance of Ability to Complete Work**

62. EPA, DTSC and RWQCB hereby acknowledge that the grant funds provided by the Navy pursuant to the ETCA and the Environmental Insurance Policies procured pursuant to the ETCA provide sufficient assurance of the Respondents' ability to complete the Work.

## **XVII. Certification of Completion**

**[GENERAL NOTE: We Need to discuss how RWQCB approval of PCAP completion fits into the certification of completion process]**

63. Completion of the Remedial Action. With respect to each ROD Implementation Area, the following procedures and requirements shall apply:

a. Within 90 days after Respondents conclude that the Remedial Action for a ROD Implementation Area has been fully performed, including recordation of a modification to the LUC(s), if required by EPA, and implementation of any other institutional controls called for in the ROD, and the Performance Standards have been attained, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC, RWQCB and the Supervising Contractor(s). If,

after the pre-certification inspection, the Respondents still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, Respondents shall submit to EPA for approval a written report requesting certification, with a copy to the DTSC and RWQCB, pursuant to Section XIV (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a professional engineer registered in the State and Respondents's Project Coordinator shall state that the Remedial Action for the ROD Implementation Area has been completed in full satisfaction of the requirements of this Order. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible official of Respondents or the Respondents' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after consultation with DTSC and RWQCB, determines that the Remedial Action for the ROD Implementation Area or any portion thereof has not been completed in accordance with this Order or that the Performance Standards have not been achieved, EPA shall within \_\_\_\_ days notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to complete the Remedial Action and achieve the Performance Standards, provided, however, that EPA may only require Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA, DTSC and RWQCB for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to Respondents's right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of Remedial Action, and after consultation with DTSC and RWQCB, that the Remedial Action has been performed in accordance with this Order and that the Performance Standards have been achieved, EPA will so certify in writing to Respondents. This certification shall constitute a Certification of Completion of the Remedial Action for a ROD Implementation Area for purposes of this Order.

d. After EPA has issued a Certification of Completion of Remedial Action for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Remedial Action for the entire Site has been performed in accordance with this Order and that the Performance Standards have been achieved for the entire Site. This certification shall constitute a Certification of Completion of Remedial Action for the Site.

64. NPL De-Listing.

After EPA has issued a Certification of Completion of Remedial Action for all of ROD Implementation Areas comprising Parcel G or for all of the ROD Implementation Areas comprising the portion of Parcel B within the Site, EPA shall initiate the regulatory proceedings necessary to effectuate a Partial Deletion from the National Priorities List of Parcel G or the portion of Parcel B within the Site from the Hunters Point Naval Shipyard Superfund Site.

65. Completion of the Work.

a. Within 90 days after Respondents conclude that all phases of the Work (including O & M for all Remedial Actions), have been fully performed for a ROD Implementation Area, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC and RWQCB. If, after the pre-certification inspection, the Respondents still believes that the Work has been fully performed for that ROD Implementation Area, Respondents shall submit a written report by a professional engineer registered in the State stating that the Work has been completed in full satisfaction of the requirements of this Order. The report shall contain the following statement, signed by a responsible corporate official of a Respondents or the Respondents' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after review of the written report, EPA, after consultation with DTSC and RWQCB, determines that any portion of the Work has not been completed for the ROD Implementation Area in accordance with this Order, EPA will notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to complete the Work, provided, however, that EPA may only require Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to Respondents's right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work for the ROD Implementation Area by Respondents, and after consultation with DTSC and RWQCB, that the Work in that ROD Implementation Area has been performed in accordance with this Order, EPA will so notify the Respondents in writing. That written notification shall constitute the Certificate of Completion of the Work for the ROD Implementation Area.

d. After EPA has issued a Certification of Completion of the Work for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Work for the entire Site has been performed in accordance with this Order for the entire Site. This certification shall constitute a Certification of Completion of the Work for the Site.

### **XVIII. EMERGENCY RESPONSE**

66. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Respondent that owns the property where the release has been caused or threatened shall, subject to Paragraph 67, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify EPA's, DTSC's and RWQCB's Project Coordinators. If EPA's Project Coordinator is unavailable, EPA's Alternate Project Coordinator must be notified. If neither of these EPA persons is available, that Respondentshall notify the EPA Emergency Response Unit, Region 9. That Respondent shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that the Respondent owning the property where the release was caused or threatened fails to take appropriate response action as required by this Section and EPA takes such action instead, that Respondent shall reimburse EPA for all costs of the response action not inconsistent with the NCP, pursuant to Section XIX (Payments for Response Costs).

67. Nothing in the preceding Paragraph or in this Order shall be deemed to limit any authority of the United States or the State, including DTSC and RWQCB, to a) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) direct or order such action, or seek an order from a Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

### **XIX. PAYMENTS FOR EPA FUTURE RESPONSE COSTS**

68. The amounts to be paid by Respondents pursuant to Paragraph 69 shall be deposited in the HPNS Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

69. Payments for EPA Future Response Costs.

a. Respondents shall pay to EPA all EPA Future Response Costs not inconsistent with the National Contingency Plan. Except as provided in Paragraph 69.c below, EPA will send Respondents, on a periodic basis, a bill requiring payment that includes a standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondents shall make all payments within 30 days of Respondents's receipt of each bill requiring payment, except as otherwise provided in Paragraph 70. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, and EPA Site/Spill ID Number #09QN [Is this accurate?] Respondents shall send the check(s) to:

U.S. Environmental Protection Agency  
Attn: Region 9 Receivables  
P.O. Box 371099M  
Pittsburgh, PA 15251

b. At the time of payment under Paragraph 69.a or 69.c, Respondents shall send notice that payment has been made to EPA and to the Regional Financial Management Officer, in accordance with Section XXXV (Notices and Submissions).

c. Within 30 days of the Effective Date, Settling Defendants shall pay to EPA \$ [to be determined] in prepayment of anticipated EPA Future Response Costs. The total amount paid shall be deposited by EPA in the HPNS Special Account, within the EPA Hazardous Substance Superfund. These funds shall be retained and used by EPA to conduct or finance future response actions. Respondents shall make the payment required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, and EPA Site/Spill ID Number #09QN. [Is this accurate?] Respondents shall send the check(s) to:

U.S. Environmental Protection Agency  
Attn: Region 9 Receivables  
P.O. Box 371099M  
Pittsburgh, PA 15251

In the event that the payments required by this subparagraph are not made within 30 days of the Effective Date, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the thirtieth day following the Effective Date.[If there would be no drawdown of funds during that period, why would interest accrue?] The Interest shall accrue through the date of the Respondents's payment. Payments of Interest made under this subparagraph shall be in addition to such

other remedies or sanctions available to EPA by virtue of Respondents's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 88. [This suggests that stipulated penalties can be imposed for failing to make advance payments to EPA. That means that there would be interest assessed and penalties as well? ]

d. After EPA issues its written Certification of Completion of Work and EPA has performed a final accounting of EPA Future Response Costs, EPA shall offset the final bill for EPA Future Response Costs by any unused amount paid by the Respondents pursuant to Paragraph 69.a or Paragraph 69.c. Any amount in excess of amounts due to EPA shall be returned to Respondents.

70. Respondents may contest payment of any EPA Future Response Costs under Paragraph 69 if Respondents determines that EPA has made an accounting error or if Respondents alleges that a cost item that is included represents costs that are inconsistent with the NCP or if the cost is outside the definition of EPA Future Response Costs. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to EPA pursuant to Section XXXV (Notices and Submissions). Any such objection shall specifically identify the contested EPA Future Response Costs and the basis for objection. In the event of an objection, the Respondents shall within the 30-day period pay all uncontested EPA Future Response Costs to EPA in the manner described in Paragraph 69. Simultaneously, the Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State and remit to that escrow account funds equivalent to the amount of the contested EPA Future Response Costs. The Respondents shall send to EPA, as provided in Section XXXV (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Respondents shall initiate the Dispute Resolution procedures in Section XXIII (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, the Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 69. If the Respondents prevails concerning any aspect of the contested costs, the Respondents shall pay that portion of the costs (plus associated accrued interest) for which Respondents did not prevail to the United States in the manner described in Paragraph 69; Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XXIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Respondents's obligation to reimburse EPA for its EPA Future Response Costs.

71. In the event that the payments required by Paragraph 69.a. are not made within 30 days of the Respondents's receipt of the bill, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Respondents's payment. Payments of Interest made under this Paragraph shall be in addition to such

other remedies or sanctions available to EPA by virtue of Respondents's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 88. The Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 69.

72. Payment of DTSC Future Response Costs.

a. As of the Effective Date of this Order, Respondents shall pay all of DTSC's Future Response Costs related to the Work performed under this Order. DTSC will bill Respondents quarterly for its response costs. Respondents shall pay DTSC within sixty (60) days of date of invoice. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the invoice pursuant to California Health and Safety Code section 25360.1. All payments made by Respondents pursuant to this Order shall be by cashier's or certified check made payable to "DTSC," and shall bear on the face the project code of the Site (Site \_\_\_\_ ) and the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control  
Accounting/Cashier  
1001 I Street, 21<sup>st</sup> Floor  
P.O. Box 806  
Sacramento, California 95812-0806

A photocopy of all payment checks shall also be sent to the person designated by DTSC to receive submittals under this Order.

b. If Respondents disputes a DTSC billing, or any part thereof, Respondents shall notify DTSC's assigned project manager and attempt to informally resolve the dispute with DTSC's project manager and branch chief. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph 72.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of DTSC interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

Special Assistant for Cost Recovery and Reimbursement Policy  
Department of Toxic Substances Control  
P.O. Box 806  
Sacramento, CA 95812-0806

A copy of the written request for dispute resolution shall also be sent to the person designated by DTSC to receive submittals under this Order. A decision on the billing dispute will be rendered by the Special Assistant for Cost Recovery and Reimbursement Policy or other DTSC designee.

73. Payment of RWQCB Future Response Costs

a. As of the Effective Date of this Order, the Respondents is liable for all of the RWQCB's costs related to the Work performed under this Order in responding to the hazardous materials at the Site. Cost recovery may be pursued by the RWQCB under CERCLA, California Health and Safety Code Sections 25187.2 and 25360, California Water Code Sections 13304 and 13365, or any other applicable state or federal statute or common law. The RWQCB will bill the Respondents quarterly for oversight activities performed by the RWQCB hereunder. The Respondents shall pay the RWQCB within sixty (60) days of receipt of the RWQCB's billing. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the billing pursuant to California Health and Safety Code section 25360.1. All payments made by the Respondents pursuant to this Order shall be by cashier's check or certified check made payable to the RWQCB and shall bear on the face the project code of the Site. Payments to the RWQCB shall be sent to:

State Water Resources Control Board  
SLIC Program  
P.O. Box 944212  
Sacramento, CA 94244-2120

A photocopy of all payment checks shall also be sent to the person designated by the RWQCB to receive submittals under this Order.

b. If Respondents disputes a RWQCB billing, or any part thereof, Respondents shall notify the RWQCB's assigned project manager and attempt to informally resolve the dispute with the RWQCB's project manager and immediate supervisor. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph 73.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of RWQCB interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

A copy of the written request for dispute resolution shall also be sent to the person designated by the RWQCB to receive submittals under this Order. A decision on the billing dispute will be rendered by Mr. Landau, or his designee.

## **XX. INDEMNIFICATION AND INSURANCE**

### **74. Respondents' Indemnification of the United States and State.**



a. The United States does not assume any additional liability by entering into this agreement or by virtue of any designation of Respondent SFRA as EPA's authorized representative under Section 104(e) of CERCLA, if applicable. Respondents shall indemnify, save and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, or representatives for or from claims or causes of action to the extent arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Order, including, but not limited to, any claims arising from any designation of Respondents as EPA's authorized representative under Section 104(e) of CERCLA, [does EPA contemplate that SFRA would be designated under 104(e)?] if applicable. Further, the Respondents agree to pay the United States and the State costs they incur including, but not limited to, reasonable attorneys fees and other expenses of litigation and settlement to the extent arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on behalf of Respondents or under their control, in carrying out activities pursuant to this Order. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither the Respondents nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Respondents notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 74.a. and shall consult with Respondents prior to settling such claim.

75. Respondents waives all claims against EPA and the State, including DTSC and RWQCB, for damages or reimbursement or for set-off of any payments made or to be made to the United States or DTSC and RWQCB arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States and the State, including DTSC and RWQCB, with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays, provided, however, that nothing herein shall limit Respondents's right to claim that any delays caused by the United States and/or State, including the DTSC and RWQCB, constitute a force majeure event under this Agreement.

76. No later than 15 days before commencing any on-site Work, Respondents shall secure, and shall maintain until the first anniversary of EPA's last Certification of Completion of the Remedial Action applicable to the Site pursuant to Section XVII (Certification of Completion), comprehensive general liability insurance with limits of five (5) million dollars, combined single limit, and automobile liability insurance with limits of one (1) million dollars, combined single limit, naming the United States, DTSC,

and RWQCB as additional insureds. In addition, for the duration of this Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. Prior to commencement of the Work under this Order, Respondents shall provide to EPA, DTSC and RWQCB certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Respondents demonstrates by evidence satisfactory to EPA, DTSC and RWQCB that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Respondents need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

## **XXI. FORCE MAJEURE**

77. "Force majeure," for purposes of this Order, is defined as any event arising from causes beyond the reasonable control of the Respondents, of any entity controlled by Respondents, or of Respondents's contractors, that delays or prevents the performance of any obligation under this Order despite Respondents's commercially reasonable efforts to fulfill the obligation. Without limitation, a court-ordered injunction or stop work order related to any Work required by this Order is considered to be a force majeure event. In addition, Respondents's inability to perform Work required under this Order due to the Navy's failure or delay in addressing a Retained Condition, or any other breach of the ETCA by the Navy, shall be considered a force majeure event. The requirement that the Respondents exercise "commercially reasonable efforts to fulfill the obligation" includes using reasonable efforts to anticipate any potential force majeure event and reasonable efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include a failure to attain the Performance Standards or financial inability to complete the Work, except to the extent that a failure by the Navy to fund all or a portion of the ETCA delays or prevents performance of obligations under this Order that are funded by the ETCA. Except as otherwise provided in this Paragraph 77, "Force Majeure" shall not, except as set forth above, include any delays caused by any disputes between the Navy and/or Respondents or any successors in title to the Site. Any delays caused by disagreements between or among EPA, DTSC and/or RWQCB, or any other regulatory agency with jurisdiction over any matter herein, shall be considered out of Respondents's reasonable control, shall be considered a force majeure event, and Respondents shall have no obligation under this Order to mitigate the effects of such force majeure event.

78. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, the Respondents shall notify orally EPA's Project Coordinator, DTSC's Project Coordinator and RWQCB's Project Coordinator or, in his or her absence, their Alternate Project

Coordinators or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 9, within 48 hours of when Respondents first knew that the event might cause a delay. Within 14 days thereafter, Respondents shall provide in writing to EPA, DTSC and RWQCB an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Respondents's rationale for attributing such delay to a force majeure event if Respondents intends to assert such a claim; and a statement as to whether, in the opinion of the Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Respondents shall include with any notice all available documentation supporting Respondents's claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure.

79. If EPA, after consultation with DTSC and RWQCB, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Order that are affected by the force majeure event will be extended by EPA, after consultation with DTSC and RWQCB, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after consultation with DTSC and RWQCB, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Respondents in writing of its decision. If EPA, after consultation with DTSC and RWQCB, agrees that the delay is attributable to a force majeure event, EPA will notify the Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

80. If the Respondents elects to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution), Respondents shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of Paragraphs 77 and 78, above. If Respondents carries this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Order identified to EPA.

## **XXII. EPA, DTSC AND RWQCB DISPUTE PROCESS**

81. If disagreements or disputes arise during the consultation process between EPA, DTSC and RWQCB under this Order, EPA, DTSC and RWQCB agree to use the

process outlined in this Paragraph to resolve such disputes. EPA, DTSC and RWQCB shall, whenever possible, make decisions by consensus at the Project Coordinator level. In the event a consensus decision cannot be reached by the EPA, DTSC and RWQCB Project Coordinators concerning the approval of a document or deliverable required by this Order, a meeting or telephone conference shall be scheduled and held within five (5) days of DTSC and/or RWQCB raising the dispute among EPA, DTSC and RWQCB Project Coordinators and their immediate supervisors to reach a consensus decision. If consensus cannot be reached by the immediate supervisors, the dispute shall be immediately elevated to the EPA Region 9 Branch Chief of the Federal Facility and Site Cleanup Branch, the DTSC Supervising Hazardous Substances Engineer II, Sacramento Office, Brownfields and Environmental Restoration Program, and the RWQCB Section Chief, Site Cleanup Section, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed above in an attempt to resolve the dispute through consensus. If no consensus can be reached, the dispute shall be immediately elevated to the EPA Region 9 Director of the Superfund Division, the DTSC Deputy Director for Site Mitigation and Brownfields Reuse, and the RWQCB Executive Officer, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed in the previous sentence in an attempt to resolve the dispute through consensus. If no consensus can be reached, the decision applicable to Respondents shall be the final decision made by the EPA Region 9 Director of the Superfund Division. By agreeing to this decision making process, DTSC and RWQCB do not waive any right or claim each agency may have for relief, and reserve any authority they may have under federal or state law to require Waste Material cleanups compliant with such law.

### **XXIII. DISPUTE RESOLUTION**

**[NOTE: THIS NEEDS TO BE MUCH MORE ROBUST AND PROVIDE ADDITIONAL RIGHTS TO RESPONDENTS. DISPUTES CONCERNING INTERPRETATION OF RIGHTS AND OBLIGATIONS UNDER THE AOC SHOULD BE SUBJECT TO ALL RIGHTS AND REMEDIES AVAILABLE]**

82. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between Respondents and EPA, DTSC, or RWQCB arising under or with respect to this Order. However, the procedures set forth in this Section shall not apply to actions by EPA to enforce obligations of the Respondents that have not been disputed in accordance with this Section. Additionally, this Section shall not apply to disputes regarding DTSC's Future Response Costs or RWQCB's Future Response Costs; such disputes will be addressed in accordance with Paragraphs 72 and 73 above, respectively.

83. Any dispute which arises under or with respect to an EPA decision under this Order shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the

dispute. The dispute shall be considered to have arisen when Respondents sends the other Parties a written Notice of Dispute.

84. Statements of Position. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA, except on disputes regarding DTSC or RWQCB Future Response Costs reimbursement, shall be binding unless within 14 days after the conclusion of the informal negotiation period, Respondents invokes the formal dispute resolution procedures of this Section by serving on EPA, with copies concurrently provided to DTSC and RWQCB, a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any position and any supporting documentation relied upon by the Respondents.

85. Within 21 days after receipt of Respondents's Statement of Position, EPA will serve on all other parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. Within 7 days after receipt of EPA's Statement of Position, Respondents may submit a Reply. DTSC and RWQCB may also file a Statement of Position for EPA's consideration on the disputed matter no later than 7 days from receipt of EPA's Statement of Position.

86. Following receipt of all statements to be submitted pursuant to Paragraphs 84 and 85, the Director of the Superfund Division, EPA Region 9 will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Respondents.

87. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Respondents under this Order, not directly in dispute, unless EPA, after consultation with DTSC and RWQCB, agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 89. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Order. In the event that the Respondents does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXIV (Stipulated Penalties).

#### **XXIV. STIPULATED PENALTIES**

88. A Respondent shall be liable for stipulated penalties in the amounts set forth in Subparagraphs 88.a. and b. to EPA, DTSC, and RWQCB, with 50% of such penalties to be paid to EPA and 50% to DTSC and RWQCB, for failure to materially comply with the requirements of this Order specified below, unless excused under Section XXI (Force Majeure). Payment of stipulated penalties to DTSC and RWQCB shall be split evenly, unless otherwise directed in the demand letter set forth in Paragraph 91. ACompliance" by a Respondent shall include completion of the activities required to be completed by that Respondent under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable

requirements of law, this Order, the SOW, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order. Under no circumstances shall a Respondent be liable for the stipulated penalties set forth in this Section as a result of the failure of the other Respondent to comply with the Order.

a. Stipulated Penalty Amounts – Work, including Payment of Future Response Costs.

The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph (i):[note-these amounts are what was negotiated at Fort Ord]

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 30th day
\$1,500	30th through 45th day
\$15,000	45th day and beyond

- i. Compliance Milestones. The following shall constitute general categories of “compliance milestones” subject to stipulated penalties under Paragraph 88.a. Specific documents within Paragraph 88.a (1) – (6) shall be subject to the stipulated penalties set forth above to the extent such documents have been designated “critical path” documents by Respondents in each Monthly Progress Report and subject to reasonable approval by EPA.

- 1) Remedial Design Document
- 2) Remedial Action Workplan
- 3) Institutional Controls Implementation Plan
- 4) Operations and Maintenance Plan
- 5) Remedial Action Completion Report
- 6) Work Status Report
- 7) Late Payment of EPA, DTSC, or RWQCB Future Response Costs
- 8) Failure to comply with any use restrictions selected in the RODs
- 9) Failure to provide access pursuant to Paragraph 43

b. Stipulated Penalty Amounts - Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents not within the scope of Subparagraph 88.a. (1) above, and any other violation of this Order:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$250	1st through 30th day
\$1,000	30th through 45th day
\$10,000	45th day and beyond

89. All penalties shall begin to accrue on the day after EPA determines that Respondents has not materially complied with the applicable requirement., and shall continue to accrue through the final day of the correction of the noncompliance. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XIV (EPA Approval of Plans and Other Submissions), except as set forth in Paragraph 58; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 9, under Paragraph 86 of Section XXIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Respondents' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

90. Following EPA's determination that Respondents have failed to comply with a requirement of this Order, EPA may give Respondents written notification of the same and describe the noncompliance. EPA may send the Respondents a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Respondents of a violation.

91. All penalties accruing under this Section shall be due and payable within 30 days of the Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Attn: Region 9 Receivables, P.O. Box 37109M, Pittsburgh PA 15262-0001, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #0941. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA, DTSC, and RWQCB as provided in Section XXXV (Notices and Submissions). All payments to DTSC and RWQCB under this Section shall be due and payable within 30 days of the Respondents' receipt from DTSC and the RWQCB of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to DTSC under this section shall be paid by cashier's or certified check made payable to "DTSC," and shall bear on the face the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control  
Accounting/Cashier  
1001 I Street, 21<sup>st</sup> Floor

P.O. Box 806

Sacramento, California 95812-0806

All payments to RWQCB under this section shall be paid by certified or cashier's check(s) made payable to the State Water Resources Control Board Cleanup and Abatement Account and shall bear on the face the Docket number of this Order. Payment shall be sent to California Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670. [Correct region?]

92. The payment of penalties shall not alter in any way Respondents's obligation to complete the performance of the Work required under this Order.

93. Penalties shall continue to accrue as provided in Paragraph 89 during any dispute resolution period, but need not be paid until the following: If the dispute is resolved by agreement, or by a decision of EPA, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

94. If Respondents fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 90.

95. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Order.

96. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

#### **XXV. Covenant Not to Sue by EPA**

97. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents or the Supervising Contractor pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the performance by Respondents of all material obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to EPA by the Respondents in this Order, including the representations made pursuant to Paragraphs 4 and 62. This covenant not to sue extends only to Respondents and



Supervising Contractor and does not extend to any other person.

#### **XXVI. RESERVATIONS OF RIGHTS BY EPA**

98. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

99. The covenant not to sue set forth in Section XXV above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;
- b. liability based on Respondents' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in a ROD, this Order, or otherwise ordered by EPA, after signature of this Order by the Respondents;
- c. criminal liability;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. liability arising from the past, present, or future disposal, of Waste Materials outside of the Site; [NEED TO CONSIDER HOW MIGRATION OFF THE ACES SHOULD BE TREATED HERE]
- f. liability for violations of federal or state law which occur during or after implementation of Removal or Remedial Actions; and
- g. liability for additional response actions that EPA determines are necessary to achieve Performance Standards.

#### **XXVII. DTSC AND RWQCB COVENANT NOT TO SUE**

100. In consideration of the actions that will be performed and the payments that

will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, DTSC and RWQCB covenant not to sue or to take administrative action against Respondents or the Supervising Contractor pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), or Section 7003 of RCRA, 42 U.S.C. 6973 for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the performance by Respondents of all material obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to DTSC and RWQCB by the Respondents in this Order, including the representations made pursuant to Paragraphs 4 and 62. This covenant not to sue extends only to Respondents and Supervising Contractor and does not extend to any other person.[We need to discuss the public process/time required for 7003 CNTS].

#### **XXVIII. DTSC AND RWQCB RESERVATIONS OF RIGHTS**

101. The covenant not to sue by DTSC and RWQCB set forth in Section XXVII does not pertain to any matters other than those expressly identified therein. DTSC and RWQCB reserve, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including but not limited to:

- (a) claims based on a failure by Respondents to meet a requirement of this Order;
- (b) liability for costs incurred or to be incurred by the State that are not reimbursed by Respondents pursuant to this Order, except for Navy-Retained Conditions;
- (c) liability for performance of response actions other than the Work approved under the Order performed by Respondents pursuant to this Order, except for Navy-Retained Conditions;
- (d) criminal liability;
- (e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- (f) liability arising from the past, present, or future disposal, of Waste Materials outside of the Site; and
- (g) liability for violations of local, state or federal law or regulations.

#### **XXIX. COVENANTS BY RESPONDENTS**

102. Respondents covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, or the State, or

its contractors and employees, with respect to Existing Contamination, Future Response Costs, or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Work required by this Order; or
- c. any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.
- d. This paragraph is not applicable to actions against the United States Navy.

103. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 99 (b), (c), (d), and (f) - (g), but only to the extent that Respondents's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

104. Nothing in this Order shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d)

### **XXX. OTHER CLAIMS**

105. By issuance of this Order, the United States, including EPA, and the State, including DTSC and RWQCB, assume no liability for injuries or damages to persons or Site resulting from any acts or omissions of Respondents.

106. No action or decision by EPA pursuant to this Order, including remedy selection by EPA, shall give rise to any right to judicial review. Respondents waives any right it may have to bring an action under Section 310 of CERCLA, 42 U.S.C. §9659, related to any response action conducted pursuant to this Order on the Site.

### **XXXI. CONTRIBUTION**

107. Nothing in this Agreement precludes the United States, the State, or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Order (other than Supervising Contractor), including any claim Respondents may have pursuant to Section 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2),(3), to pursue any such

persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

108. In the event of a suit or claim for contribution brought against Respondents, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that Respondents is not a BFPP, or has lost its status as a BFPP), the Parties agree that this Order shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents would be entitled, from the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, DTSC, RWQCB or by any other person with respect to Existing Contamination.

109. In the event Respondents were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP, the Parties agree that this Order shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents has resolved its liability for all response actions taken or to be taken and all response costs incurred or to be incurred by EPA, DTSC, RWQCB or by any other person with respect to Existing Contamination.

110. Respondents agrees that with respect to any suit or claim brought by it for matters related to this Order it will notify EPA, DTSC, and RWQCB in writing no later than 60 days prior to the initiation of such suit or claim.

111. Respondents also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Order it will notify in writing EPA, DTSC, and RWQCB within 10 days of service of the complaint on it.

## **XXXII. NONCOMPLIANCE, STOP WORK AND DEFAULT DETERMINATIONS**

112. Respondents shall perform and complete all necessary response actions at the Site (except for Navy-Retained Conditions that are not Added Conditions) in accordance with CERCLA, the NCP, ARARs not otherwise waived, and relevant guidance.

113. Notices of Noncompliance and Stop Work. Following EPA’s determination, after consultation with DTSC and RWQCB, that Respondents has materially failed to comply with a requirement of this Order, EPA may give Respondents written notification of the same, with a copy to DTSC, and RWQCB and describe the noncompliance (“Notice of Noncompliance”). EPA may also give Respondents written

notification that Respondents should stop work on all or any portion of its response action activities at the Site until EPA determines that Respondents has remedied such noncompliance (“Notice to Stop Work”). Upon receipt of a Notice to Stop Work, Respondents shall immediately stop work on all or any portion of its response action activities at the Site as specified in such notice, and shall remedy the noncompliance. Respondents shall resume such response action activities only upon receipt of written notification from EPA, after consultation with DTSC and RWQCB, that Respondents may proceed with such activities as specified in the notification.

114. Finding of Default. EPA, after consultation with DTSC and RWQCB, may determine that a Default has occurred in one or more of the following situations: (i) EPA has issued to Respondents two or more Notices of Noncompliance for significant noncompliance, with or without accompanying Notices to Stop Work, pursuant to Paragraph 113; (ii) EPA determines that Respondents is implementing the Work in a manner that may cause endangerment to human health or the environment; (iii) EPA determines that Respondents has effectively ceased to perform all or a portion of the Work for any reason, including lack of Air Force funding through the ESCA, except for a Force Majeure event pursuant to Section XXI that results in only a temporary delay in performance; (iv) Respondents misappropriates or misuses funds received under the ESCA; or (v) Respondents is substantially and consistently deficient or late in its performance of the Work. Prior to issuance of a Finding of Default, EPA shall provide Respondents in writing (with copies to the Air Force, DTSC and RWQCB) with a Notice of Intent to Find Default and of the proposed basis for issuing a Finding of Default. Respondents may dispute the Notice of Intent to Find Default, in accordance with the process provided in Section XXIII (Dispute Resolution). In the event of an EPA determination that a Default has occurred, either without Respondents having invoked the Dispute Resolution process in Section XXIII, or following the conclusion of such Dispute Resolution process, EPA will send Respondents a written Finding of Default, with copies to the Navy, DTSC, and RWQCB. The Finding of Default will provide the basis for EPA’s determination and will specify whether Respondents may continue to perform the Work while the Air Force prepares to resume response action activities under the Amended FFA.

115. Within thirty (30) days of Respondents’s receipt of the Finding of Default, or such other time period specified by EPA, Respondents shall cease performance of the Work.

116. In the event that the Navy resumes performance of response action activities under the Amended FFA, Respondents shall fully cooperate in the orderly transfer of responsibilities for performance of the Work to the Navy

### **XXXIII. ACCESS TO INFORMATION**

117. Respondents shall provide to EPA, DTSC and RWQCB upon request, copies of all documents and information within Respondents’s possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of

this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, DTSC and RWQCB for purposes of investigation, information gathering, or testimony, Respondents's employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

a. Business Confidential and Privileged Documents. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA, DTSC and RWQCB under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, DTSC and RWQCB or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e) (7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

b. The Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents asserts such a privilege in lieu of providing documents, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

c. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

#### **XXXIV. RETENTION OF RECORDS**

118. Until 10 years after the Respondents's receipt of EPA's notification pursuant to Paragraph 65.c. of Section XVII (Certification of Completion of the Work), Respondents, or its successor, shall preserve and retain all non-identical copies of the last draft or final version of material documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that Respondents (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned

documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary. [RESERVED FOR FURTHER MODIFICATIONS]

119. At the conclusion of this document retention period, Respondents, or its successor, shall notify EPA, DTSC and RWQCB at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DTSC, Respondents shall deliver any such records or documents to EPA, DTSC and RWQCB. The Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents asserts such a privilege, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

#### **XXXV. NOTICES AND SUBMISSIONS**

120. Whenever under the terms of this Order, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Order with respect to EPA, DTSC, RWQCB and the Respondents, respectively.

##### As to the EPA:

Keith Takata  
Director, Superfund Division  
United States Environmental Protection Agency  
Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

and

Penny Reddy  
EPA Project Coordinator, SFD-8-1  
United States Environmental Protection Agency  
Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

As to the Regional Financial Management Officer:

Chief, Cost Accounting  
United States Environmental Protection Agency  
Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

As to the California Department of Toxic Substances Control:

Anthony J. Landis, P.E.  
Chief  
Northern California Operations  
Office of Military Facilities  
Department of Toxic Substance Control  
8800 Cal Center Drive  
Sacramento, CA 95826

and

Stephen Pay, M.Sc.  
Project Manager  
Brownfields and Environmental Restoration Program  
Department of Toxic Substances Control  
8800 Cal Center Drive  
Sacramento, CA 95826

**XXXVI. APPENDICES**

121. The following appendices are attached to and incorporated into this Order:
- A. Legal description of the Site
  - B. Map of the Site
  - C. Statement of Work
  - D. Known Conditions Documentation



- E. Delayed Transfer Parcels and Non-Transfer Parcels
- F. Development Areas
- G. Land and Water Use Restrictions

#### **XXXVII. COMMUNITY RELATIONS**

122. Respondents shall prepare and submit for review and approval by EPA, in consultation with DTSC and RWQCB, a Community Relations Plan, as defined in the SOW. EPA, after consultation with DTSC and RWQCB, will determine the appropriate role for the Respondents under the Plan. Respondents shall also cooperate with EPA, DTSC, and RWQCB in providing information regarding the Work under this Order to the public. As requested by EPA, Respondents shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site or the Work being conducted under this Order.

#### **XXXVIII. MODIFICATIONS**

123. EPA, after consultation with DTSC and RWQCB, may determine that in addition to tasks defined in the SOW, or initial approved work plans, other additional work may be necessary to accomplish the Performance Standards. To the extent that such additional work is within the scope of the the RODs and does not otherwise constitute an amendment, modification or supplement to the RODs, EPA, after consultation with DTSC and RWQCB, may request in writing that Respondents perform these response actions and Respondents shall confirm its willingness to perform the additional work, in writing, to EPA, DTSC, and RWQCB within 14 days of receipt of EPA's request, or Respondents may invoke dispute resolution in accordance with Section XXIII. Subject to EPA resolution of any dispute, Respondents shall implement the additional tasks which EPA, after consultation with DTSC and RWQCB, determines are necessary. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

124. If Respondents seeks permission to materially deviate from any approved work plan or schedule or the SOW, Respondents's Project Coordinator shall submit a written request to EPA, DTSC and RWQCB for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving written approval from the EPA Project Coordinator, after consultation with the DTSC Project Coordinator and the RWQCB Project Coordinator.

125. No informal advice, guidance, suggestion, or comment by the EPA, DTSC, or RWQCB Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of its obligation to obtain any formal approval required by this Order, or to

comply with all requirements of this Order, unless it is formally modified in accordance with this Section.

126. This Order shall be made available for a period of not less than thirty (30) days for public notice and comment. The United States, DTSC and RWQCB reserve the right to withdraw or withhold their consent if the comments regarding the Order disclose facts or considerations which indicate that the Order is inappropriate, improper, or inadequate.

#### **XXXIX. TERMINATION**

127. This Order shall terminate under one or more of the following circumstances:

- a. Upon a Finding of Default by EPA, in consultation with DTSC and RWQCB, under Paragraph 114;
- b. Upon EPA's Certification of Completion of the Work, pursuant to Paragraph 65; or
- c. Upon termination of the ETCA, this Order shall terminate with respect to any Remedial Action for which EPA has not yet issued a Certification of Completion of Remedial Action. Upon termination of the ETCA, this Order shall remain effective with respect to any Remedial Action and Work for which EPA has already issued the Certification of Completion of Remedial Action.

#### **XXXX. EFFECTIVE DATE**

128. This Order shall be effective when EPA issues written notice to Respondents that each of the following conditions have been met: a.) the expiration of the public notice and comment period for this Order and EPA's determination that comments received, if any, do not require EPA to modify or withdraw from this Order; b.) the completion of the public comment process on the FOSET; c.) the execution of the ESCA and the Amended FFA; and d.) EPA's approval of and the Governor of the State of California's concurrence with the Covenant Deferral Request.

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HPNS

**For Respondents:**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HPNS

**For EPA:**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

---

Michael Montgomery  
Assistant Director of Federal Facilities and Site  
Cleanup Branch  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne St.  
San Francisco, CA 94105

---

Date

---

Robert G Carr  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne St.  
San Francisco, CA 94105

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HPNS

**For the United States:**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

---

Assistant Attorney General  
Environment and Natural Resources Section  
U.S. Department of Justice

Washington, D.C. 20530

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HPNS

**For DTSC:**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_

ADMINISTRATIVE ORDER ON CONSENT  
FOR RI/FS AND RD/RA FOR CLEANUP  
OF PORTIONS OF THE FORMER HPNS

**For RWQCB:**

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_

**AGREEMENT TO IMPLEMENT THE  
CONVEYANCE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA,  
ACTING BY AND THROUGH THE SECRETARY OF THE NAVY,  
UNITED STATES DEPARTMENT OF THE NAVY  
AND  
THE SAN FRANCISCO REDEVELOPMENT AGENCY  
FOR THE CONVEYANCE OF HUNTERS POINT NAVAL SHIPYARD  
WITH REGARD TO IR SITES 7/18**

1       **THIS IMPLEMENTING AGREEMENT** (the “Implementing Agreement”), entered to  
2       implement the *Conveyance Agreement between the United States of America, Acting by and*  
3       *through the Secretary of the Navy, United States Department of the Navy, and the San Francisco*  
4       *Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard* (the “Conveyance  
5       Agreement”) with regard to IR Sites 7/18, as defined below, is entered into this \_\_\_\_\_ day of  
6       \_\_\_\_\_, 20\_\_ by and between the **UNITED STATES OF AMERICA**, acting by and  
7       through the Department of the Navy (the “Government”), and the **SAN FRANCISCO**  
8       **REDEVELOPMENT AGENCY** (“SFRA”), recognized by the Office of Economic Adjustment  
9       on behalf of the Secretary of Defense as the local redevelopment authority for the Hunters Point  
10      Naval Shipyard. The Government and the SFRA are each sometimes referred to herein  
11      individually as a “Party” and collectively as the “Parties.”

**RECITALS**

12  
13  
14  
15      **WHEREAS**, in 1991, the Defense Base Closure and Realignment Commission  
16      recommended the closure of the former Hunters Point Naval Shipyard, located within the City  
17      and County of San Francisco (“City”), which consists of approximately 936.37 acres of real  
18      property, together with the buildings, improvements and related and other tangible personal  
19      property located thereon and all rights, easements and appurtenances thereto (“Hunters Point  
20      Naval Shipyard”).

21  
22      **WHEREAS**, pursuant to the authority provided by Section 2824(a) of the National  
23      Defense Authorization Act for Fiscal Year 1991 (Pub. L. No. 101-510), as amended by Section  
24      2834 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. No. 103-160), the  
25      Secretary of the Navy may convey the Hunters Point Naval Shipyard to the City (or a local reuse  
26      organization approved by the City, such as the SFRA) for such consideration and under such  
27      terms and conditions as the Secretary considers appropriate.

28  
29      **WHEREAS**, on March 31, 2004, the Parties executed the Conveyance Agreement  
30      which, among other items, described the process for conveying Parcels A, B, C, D, E and F from  
31      the Government to the SFRA, and the acceptance of such parcels by the SFRA.  
32



## Page 2.

## IMPLEMENTING AGREEMENT REGARDING IR SITES 7/18

Page 3.

### ARTICLE 3. SFRA Acceptance.

3.1 Immediately following the execution by the Parties of this Implementing Agreement, the Navy shall execute and deposit with the Escrow Agent a deed for IR Sites 7/18 substantially in the form set forth in Exhibit D ("Navy Deed for IR Sites 7/18").

3.2. Immediately following the execution by the Parties of this Implementing Agreement, the SFRA shall execute and deposit with the Escrow Agent a deed acceptance in the form set forth in Exhibit E ("SFRA Acceptance"), of the Navy Deed for IR Sites 7/18.

3.3 The Escrow Agent shall record the Navy Deed for IR sites 7/18 and the SFRA Acceptance in accordance with the Escrow Instructions following the completion of all of the IR Sites 7/18 Property Conditions set forth and described more fully in Article 1 and Exhibit A.

### ARTICLE 4. Survival and Benefit.

4.1 Unless defined separately, the terms used in this Implementing Agreement shall be the same as used in the Conveyance Agreement.

4.2 Except as set forth herein, and unless modified specifically by this Implementing Agreement, the terms and conditions contained in the Conveyance Agreement shall remain binding upon the Parties and their respective successors and assigns as set forth in the Conveyance Agreement.

### ARTICLE 5. Exhibits.

5.1 The following Exhibits are attached hereto and made a part of this Implementing Agreement, as follows:

- Exhibit A: IR Sites 7/18.
- Exhibit B: IR Sites 7/18 Property Conditions.
- Exhibit C: Escrow Instructions.
- Exhibit D: Navy Deed for IR Sites 7/18.
- Exhibit E: SFRA Acceptance.

[Signature Page Follows]

## IMPLEMENTING AGREEMENT REGARDING IR SITES 7/18

Page 4.

1           **IN WITNESS WHEREOF**, and intending to be legally bound hereby, the Parties to this  
2 Implementing Agreement, by their authorized representatives, hereby cause this Implementing  
3 Agreement to be executed.  
4  
5  
6

### 7 **SAN FRANCISCO REDEVELOPMENT AGENCY**

8  
9

10 By: \_\_\_\_\_

11 NAME:

12 TITLE:       Director

13  
14 Dated: \_\_\_\_\_  
15  
16

### 17 **THE UNITED STATES OF AMERICA**

18  
19

20 By: \_\_\_\_\_

21           Mr. Robert Griffin

22           Assistant Commander for Acquisition, Naval Facilities Engineering Command  
23

24 Dated: \_\_\_\_\_

**EARLY TRANSFER COOPERATIVE AGREEMENT**

**COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD**

~~CONSISTING OF PARCEL "B" AND PARCEL "G"~~

**BETWEEN**

**THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY**

**AND**

**THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA**

# **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

**EARLY TRANSFER COOPERATIVE AGREEMENT  
COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD  
~~CONSISTING OF PARCEL "B" AND PARCEL "G"~~  
BETWEEN  
THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY  
AND  
THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA  
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# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

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**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

**EARLY TRANSFER COOPERATIVE AGREEMENT  
COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD  
~~CONSISTING OF PARCEL "B" AND PARCEL "G"~~  
BETWEEN  
THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY  
A N D  
THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA**

1 ~~THIS~~ **EARLY TRANSFER COOPERATIVE AGREEMENT**  
2 ("Agreement") is made by and between the **UNITED STATES OF AMERICA**, acting by  
3 and through Naval Facilities Engineering Command ("Navy") and the **SAN FRANCISCO**  
4 **REDEVELOPMENT AGENCY**, San Francisco, California ("SFRA") recognized as  
5 the local redevelopment authority by the Office of Economic Adjustment ("OEA") on  
6 behalf of the Secretary of Defense and also a local public authority legally empowered to  
7 enter into this Agreement. Hereinafter, the Navy and the SFRA are each sometimes referred to  
8 individually as a "Party" and collectively as the "Parties."

9  
10 **GENERAL PROVISIONS**

11  
12 ~~The~~ Federal Government, for and on behalf of the citizens of the United  
13 States of America, acts as the steward of certain real property on which it operates and  
14 maintains military facilities necessary for the defense of the United States of America. Certain  
15 military facilities are no longer required for that mission, and, in accordance with various base  
16 closure statutory authorities, the Department of Defense ("DOD") closed and plans to  
17 dispose of real and personal property at those facilities. The Navy is authorized to dispose of  
18 real and personal property on Hunters Point Naval Shipyard ("HPNS"), to the City of San  
19 Francisco or to a local reuse organization approved by the City, in accordance with Section 2824  
20 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as  
21 amended by Section 2834 of the National Defense Authorization Action Act for Fiscal Year  
22 1994 (Public Law 103-160). The SFRA is a local reuse organization approved by the City of  
23 San Francisco to accept conveyance of HPNS property in accordance with the authorities set out  
24 above.

25  
26 The Parties did execute and enter into that certain Conveyance Agreement Between the  
27 United States of America, Acting by and through the Secretary of the Navy, and the San  
28 Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard, dated  
29 March 31, 2004 ("Conveyance Agreement").

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), Federal property may be transferred prior to the completion of all remedial action necessary to protect human health and the environment. Under this early transfer authority, the Navy intends to convey title to the portion of HPNS property known as the Area Covered by Environmental Services (hereinafter "ACES"), to the SFRA. The ACES is defined in Section 222 below and shown in Appendix 2. The SFRA assumes responsibility for certain environmental response activities (hereinafter the "Environmental Services", as defined in Section 211 below) for the consideration set forth in this Agreement. The principal purpose of this Agreement is to facilitate early transfer and redevelopment by providing the contractual vehicle under which the SFRA will perform the Environmental Services in the ACES and be compensated for such performance.

It is in the public interest and will be beneficial to the Navy and the SFRA for the SFRA to cause to be performed the Environmental Services at the ACES. As set forth in the Amended Federal Facilities Agreement ("Amended FFA"), as defined in Section 231 below, the Navy will resume CERCLA responsibility for Environmental Services for compliance with the 1990 Amended FFA in the event of a Finding of Default as provided in the Administrative Order on Consent ("AOC") as hereinafter defined, or upon a failure of the Navy to continue its funding obligations, as described in Article IV, or upon a termination of this Agreement pursuant to Article X. The Navy's obligations pursuant to the Amended FFA are not affected by this Agreement with respect to Navy Retained Conditions, as defined in Section 206.

This Agreement benefits the Navy and the SFRA because it facilitates early transfer and immediate reuse by allowing the SFRA to cause to be performed certain environmental remediation activities and simultaneously facilitates redevelopment as defined herein. This Agreement, executed as part of an early transfer, facilitates SFRA access and control to the ACES in conjunction with implementation of the SFRA's Reuse Plan (as defined in Section 220 below). In addition, early transfer will allow the Navy to convey title in compliance with CERCLA requirements at an earlier date than could otherwise be achieved. This Agreement is a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10 U.S.C. Section 2701(d)(1).

In accordance with 42 U.S.C. 9620 (h)(3)(C)(iii), after all remedial action necessary to protect human health and the environment with respect to any hazardous substances remaining on the ACES on the date of transfer has been taken, the Navy will deliver to the SFRA an appropriate document containing the CERCLA warranty that "... all necessary-response action necessary to protect human health and the environment has been taken by the United States...."

The Navy and the SFRA have entered into this Agreement for the purpose of establishing the terms and conditions necessary to obtain Regulatory Closure for the ACES and ensure the execution of Long-Term Obligations associated with Regulatory Closure.

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

The Navy agrees to provide funds to the SFRA in accordance with and subject to the provisions of this Agreement and to undertake and complete its obligations under Section 302 hereof. The SFRA agrees to perform the Environmental Services in accordance with and subject to the provisions of this Agreement.

## Article I SCOPE AND PURPOSE

### Section 101. Performance of Environmental Services

—The SFRA shall cause to be performed the Environmental Services in accordance with and subject to the provisions of this Agreement. The Environmental Services, to the extent required to be performed under this Agreement, with regard to the ACES, shall satisfy the requirements of (i) CERCLA as provided for in the CERCLA ~~Record of Decisions (“RODs”)~~ and RODs (as defined in Section 207), the National Contingency Plan (~~“NCP”~~); “NCP”), and the Administrative Order on Consent (as hereinafter defined), and (ii) applicable State and Federal laws and regulations governing releases of petroleum as provided in the Petroleum Corrective Action Plans (~~“PCAPs”~~ as defined in Section 232). The Navy shall remain responsible for any Navy-Retained Conditions.

### Section 102. Performance Method

—The CERCLA RODs ~~and~~ PCAPs and AOC together establish the process for obtaining Regulatory Closure within the ACES. By the execution of this Agreement, the Navy concurs with the process set forth in the CERCLA RODs ~~and~~ PCAPs and AOC, and all documents and approvals referenced therein. ~~In the event that an Environmental Regulatory Agency requires changes to the Environmental Services necessary to satisfy the CERCLA RODs and PCAPs, the SFRA shall conduct and bear the cost of such services.~~

## Article II DEFINITIONS

### Section 201. Agreement

—The term “Agreement” means this Early Transfer Cooperative Agreement.

### Section 202. Navy's Representative

—The Navy's representative for execution purposes is Naval Facilities Engineering Command, which is responsible to the office of the Secretary of the Navy for environmental remediation within the ACES, or its successor.

### Section 203. SFRA

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1       ~~\_\_\_\_\_~~ The term "SFRA" means the San Francisco Redevelopment Agency, a  
2 Redevelopment Authority of the State of California, recognized as the local redevelopment  
3 authority for the HPNS by the OEA on behalf of the Secretary of Defense. The SFRA is an  
4 entity that is within the meaning of the term "local government agency" as such term is used  
5 in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into "agreements on  
6 a reimbursable or other basis."  
7

### 8 **Section 204.** Hunters Point Naval Shipyard

9

10       ~~\_\_\_\_\_~~ The term "Hunters Point Naval Shipyard" or "HPNS" means ~~the entirety that~~  
11 portion of the real property at the former Hunters Point Naval Shipyard, shown on the map  
12 attached as Appendix 1 and incorporated herein by reference.  
13

### 14 **Section 205.** Administrative Order on Consent ("AOC").

15

16       The term "Administrative Order on Consent" or "AOC" means that certain signed  
17 agreement executed between the SFRA, [Lennar entity] and the Environmental Regulatory  
18 Agencies.  
19

### 20 **Section 206.** Navy-Retained Conditions

21

22       ~~\_\_\_\_\_~~ The term "Navy-Retained Conditions" means any condition or cost  
23 associated with Unexploded Ordnance; Military Munitions; chemical, radiological or  
24 biological warfare agents; ~~and Radiological Materials; and Uninsured Unknown Conditions.~~ The  
25 term shall also include (i) the performance of CERCLA five-year reviews for ~~year 2013 and year~~  
26 ~~2018 only,~~ years 2013, 2018, 2023 and 2028 for remedies selected in a CERCLA ROD issued by  
27 the Navy, ~~and the performance of all activities necessary to achieve Regulatory Closure at~~  
28 ~~IR7/18 and Building 140 [describe relevant portion], and~~ (ii) any other activity identified as the  
29 responsibility of the Navy in the ~~amended FFA (as defined in Section 231 below)~~ Amended FFA,  
30 and (iii) any change to the requirements in the CERCLA RODs, PCAP, or AOC set forth in an  
31 Explanation of Significant Differences under CERCLA or a ROD amendment or a PCAP  
32 amendment (or any other change required by the Regulatory Agencies to the requirements in the  
33 CERCLA RODs, PCAP or AOC), to the extent the costs associated with such change are not  
34 covered, or to the extent they are covered, they could result in an exhaustion of coverage by the  
35 Insurance Policies; to the extent such changes are the result of negligent acts or omissions of the  
36 Navy or parties acting on behalf of the Navy, such costs are Navy Retained Conditions even if  
37 covered by the Insurance Policies; to the extent such changes are the result of negligent acts or  
38 omissions by the SFRA or parties acting on behalf of the SFRA, such costs are not Navy  
39 Retained Conditions, even if they are not covered by the Insurance Policies.  
40

### 41 **Section 207.** CERCLA RODs

42

43       ~~\_\_\_\_\_~~ The term "CERCLA RODs" means the CERCLA Record of Decision for

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Parcel B dated \_\_\_\_\_, and the CERCLA Record of Decision for Parcel G dated \_\_\_\_\_.

### Section 208. Regulatory Closure

\_\_\_\_\_The ~~term~~ “Term” “Regulatory Closure” means approval or certification of completion of any necessary remedial or corrective action required by the CERCLA RODs, the PCAPs and the AOC, or the issuance of a “No Further Action” letter or equivalent finding by the appropriate Environmental Regulatory Agency or Agencies pursuant to the statutes and regulations administered by those Agencies with respect to the ACES and undertaken by the SFRA pursuant to this Agreement. The term “Regulatory Closure” shall include without limitation and as set forth in the AOC (i) Completion of the Work with respect to the ACES, (ii) Completion of the Remedial Action with respect to specific remedial actions, notwithstanding Long-Term Obligations, and (iii) Conclusion of Remedial Action Activities with respect to specific development areas within the ACES, notwithstanding Long-Term Obligations.

### Section 209. Navy and Government

\_\_\_\_\_The terms “Navy” and “Government” are used interchangeably herein.

### Section 210. Long-Term Obligations

\_\_\_\_\_The term “Long-Term Obligations” means any long-term review, monitoring, reporting and institutional control (“IC”) and operation and maintenance requirements that are required in support of and after Regulatory Closure and associated with or in furtherance of the CERCLA RODs ~~and~~ PCAPs and AOC, including providing ~~support~~ existing records and reports for the Navy’s preparation of the CERCLA five-year reviews ~~in 2013~~ for years 2013, 2018, 2023 and 2028 and SFRA preparation of the CERCLA five-year reviews thereafter.

### Section 211. Environmental Services

\_\_\_\_\_The term “Environmental Services” means activities solely with respect and limited to Known Conditions and Unknown Insured Conditions necessary to obtain Regulatory Closure, and ~~to which~~ upon which such Regulatory Closure is conditioned. Environmental Services does not include the performance of Ineligible Work as defined in Section 218 below.

### Section 212. Known Conditions

\_\_\_\_\_The term “Known Conditions” means those environmental conditions in the ACES expressly set forth in Appendix 3 to this Agreement and includes ~~“Reasonably Expected Environmental Conditions” as defined in Section 221 below. The term “Known Conditions” does not~~ a contaminant at a site that is, based upon the state of scientific knowledge at the time

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

that this Agreement is executed, a scientifically-accepted "break-down" or "daughter" or "parent" of a contaminant identified in Appendix 3 as being present at that respective site. Notwithstanding any environmental conditions set forth in Appendix 3, or associated "break-down," "daughter," or "parent" product, in no event shall the term "Known Conditions" include "Navy-Retained Conditions" as defined above and in Section 206.

### Section 213. ~~Unknown~~ Insured Unknown Conditions

—The term "Insured Unknown ~~Insured Conditions~~ Conditions" means those environmental conditions in the ACES that are not Known Conditions and are within the coverage grant of, and for which, and to the extent, the SFRA is ~~insured and~~ paid pursuant to, the Environmental Insurance Policies. This term also includes a specific Unknown Condition that otherwise would have been an ~~Unknown~~ Insured Unknown Condition but for which coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies. ~~Excluded Unknown Insured Conditions shall be limited~~ ("Excluded Insured Unknown Condition"). The term "Insured Unknown Conditions" shall include Excluded Unknown Insured Conditions only to the extent of specific costs ~~which~~ that would have otherwise been funded by the Environmental Insurance Policies but for such failure of the SFRA or the named insured.

### ~~Section 214. — Reserved.~~ Section 214. Uninsured Unknown Conditions

The term "Uninsured Unknown Conditions" means those environmental conditions in the ACES that are neither Known Conditions or Insured Unknown Conditions.

### Section 215. Radiological Materials

The term "Radiological Materials" means solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides defined as being derived from the Navy's work on the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products ~~manufactured for~~ commonly used in non-military applications such as ~~radioluminescent signs,~~ tungsten welding electrodes, and household smoke detector components. [Need to discuss procedures in event Radiological Materials are encountered unexpectedly.]

### Section 216. Environmental Insurance Policies

—The term "Environmental Insurance Policies" means the environmental insurance policy(ies) issued and approved pursuant to Section XXXXX and meeting the



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

requirements of Section XXXXX below and attached as Appendix 4.

**Section 217.** Reserved

**Section 218.** Ineligible Work

—The term "Ineligible Work" means the performance of any or more of the following work:

a. —~~a.~~ Cleanup of lead based paint ("LBP") and asbestos containing materials ("ACM") incorporated into building materials in their original location ~~and not previously demolished by the Navy or its contractors and lead in soil resulting from natural weathering LBP from structures.~~

b. —~~b.~~ Cleanup of pesticides and herbicides applied in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and its predecessors including, but not limited to, chlordane ~~legally properly~~ applied as a termiticide to presently existing wooden structures, ~~their foundations, and soils and their foundations, to the extent such work is covered by Environmental Insurance Policies. [(1) How do we determine that pesticides were properly applied 30 years ago. (2) If chlordane at unacceptable levels is encountered in soil where no current building exists, that should be Navy Retained].~~

c. —~~e.~~ Management and off-site disposal of contaminated soil or solid waste excavated or generated during the course of Redevelopment Activity within any portion of the ACES for which all appropriate Environmental Regulatory Agencies have previously approved Regulatory Closure following (1) the installation of a cap/cover remedial action by the SFRA, or (2) issuance of an approved Response Action Completion Report ("RACR") following installation of a cap/cover remedial action by the Navy.

d. —~~d.~~ Additional remediation necessary to implement a change in land use from the land uses set forth in the Reuse Plan.

e. —~~e.~~ Management and disposal of construction and demolition debris ~~created~~ generated in the course of Redevelopment Activity.

f. —~~f.~~ Clean up of contaminants within existing buildings and structures, that have not been released into the environment; except the following shall not be Ineligible Costs: (1) removal of liquids, solids, gases, sediments, and/or sludges from and including oil/water separators and other equipment and containment vessels within or beneath structures; and (2) friable, accessible asbestos to the extent the equipment ~~and~~ vessels ~~are or~~ asbestos were not reasonably discovered by visual inspection during a walk-through in which



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both parties participated.

g. Any reconstruction, alteration, or replacement of any initial cap/cover containment remedial action constructed pursuant to a ROD unless such cap/cover is deemed not to be operating properly and successfully or is otherwise determined by an Environmental Regulatory Agency to have failed.

h. ~~g.~~ Non-cleanup environmental compliance activities relating to redevelopment/construction following conveyance (e.g., compliance with air quality permit requirements for control of fugitive dust emissions that are not contaminated with hazardous substances or petroleum and the National Pollutant Discharge Elimination System [~~"NPDES"~~]) stormwater discharge permit requirements regulating excavation/disturbance of soil that is not contaminated with hazardous substances or petroleum).

i. ~~h. Any redevelopment, reconstruction, alteration, or replacement of any initial cap/cover containment remedial action constructed pursuant to a ROD unless such cap/cover is deemed ineffective for its intended purpose by determination of a Regulatory Agency.~~

i. ~~i.~~ Any other work or activity that is not related to: (1) achieving ~~"Regulatory Closure"~~ for releases of hazardous substances or petroleum within the ACES, or (2) performing associated ~~"Long-term Obligations."~~

i. ~~j.~~ Regulatory Enforcement Activities unrelated to regulatory oversight pursuant to the CERCLA RODS, PCAPs, or the AOC.

k. ~~k.~~ Cleanup that is required as a result of a violation of (1) use restrictions by the SFRA, its successors and assigns, ~~or~~ (2) any land use restriction, groundwater restriction, deed covenant or ~~institutional control~~ IC applicable to the ~~Early Transfer Property~~ ACES.

~~+1.~~ Cleanup arising from the failure of the SFRA, its successors and assigns, to operate or maintain a remedy as required by ~~the ROD~~ USEPA through the CERCLA RODs, PCAPs, AOC, Land Use Control Remedial Design Reports (~~"LUC RD"~~), Risk Management Plan (~~"RMP"~~) and/or Operation and Maintenance Plan (~~"OMP"~~).

Notwithstanding anything to the contrary in this Section 218, in no event shall performance of any work in accordance with Sections 301(f) and (g) and 302(d) with respect to Navy-Retained Conditions be considered "Ineligible Work."

### Section 219. Redevelopment Activity

~~—~~ The term Redevelopment Activity means activities undertaken after the

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Effective Date of this Agreement in furtherance of the development of the property and not otherwise required by the CERCLA RODs, PCAPs, and/or AOC, including, but not limited to, construction of roads, utilities, and structures and demolition and/or removal of "hardscape" such as roads, sidewalks, and building foundations; provided, that any Navy Retained Conditions discovered during the course of a Redevelopment Activity, shall remain as and be treated as Navy Retained Conditions.

### Section 220. Reuse Plan

~~\_\_\_\_\_The term "Reuse Plan" means the Department of Housing and Urban Development ("HUD") approved-~~ means that certain Redevelopment Plan for the HPNS, approved by the Mayor and Board of Supervisors for the City of San Francisco in July of 1997, as such Redevelopment Plan has been amended or superseded as of the date of the execution of this Agreement, all in accordance with the California Community Redevelopment Law (Health and Safety Code Section 33000, et seq.).

### ~~Section 221. Reasonably Expected Environmental Conditions~~

~~\_\_\_\_\_The term "Reasonably Expected Environmental Conditions" means those environmental conditions that can be reasonably expected in consideration of the specific sources of the Known Conditions, customary uses on the ACES associated with Navy operations and resulting environmental conditions. By way of example and not limitation, whether an environmental condition may be reasonably expected or not is illustrated as follows: Environmental conditions that are reasonably expected include (i) the concentration of a contaminant at a site is greater than the concentration for that respective contaminant identified at the site in Appendix 3, (ii) a contaminant at a site is, based upon the state of scientific knowledge at the time that this Agreement is executed, a scientifically accepted "break down" constituent of, or associated with, a contaminant identified in Appendix 3 as being present at that respective site, (iii) the physical extent of a contaminant at a site is greater than the extent of that contaminant identified in Appendix 3 as being present at that respective site.~~

### Section 222. Area Covered by Environmental Services

~~\_\_\_\_\_The term "Area Covered by Environmental Services" or "ACES"~~ means that area identified on the map in Appendix 2.2, and specifically excludes IR Sites 7/18 and the radiation-impacted area around Building 140. The conveyance of IR Sites 7/18 and the radiation-impacted area around Building 140 will be addressed separately in accordance with that certain Agreement to Implement the Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point Naval Shipyard with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140 dated \_\_\_\_\_, and set forth in Appendix 13.

### Section 223. Unexploded Ordnance/Munitions or Explosives of Concern

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

—The term "Unexploded Ordnance" or "UXO" means Military Munitions that have been fired, dropped, launched, projected, or otherwise placed, abandoned or disposed of in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

### Section 224. Military Munitions

—The term "Military Munitions" means all ammunition products and components produced or used by or for DOD or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy ("DOE") and National Guard personnel. The term "Military Munitions" includes, but is not limited to, confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. The term "Military Munitions" does not include wholly inert items and non-standard explosive devices made from either military or non-military materials by personnel unrelated to DOD. However, the term "Military Munitions" does include non-nuclear components of nuclear devices managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011 et seq., have been completed.

### Section 225. Navy Obligations

—The term "Navy Obligations" means the obligations of the Navy as set forth in Section 302 hereof.

### Section 226. Regulatory Oversight

a. —The term "Regulatory Oversight" includes the following services provided by the United States Environmental Protection Agency ("USEPA"), the California Department of Toxic Substances Control ("DTSC"), the San Francisco Bay Water Quality Control Board ("Water Board") ~~or~~ the California Department of Public Health ("CDPH"), and "CDPH", or other independent State or Federal regulatory agency with jurisdiction over the ACES, which are considered allowable costs under this Agreement ~~÷a.~~  
Technical review of documents or data;

b. ~~b.~~ —Identification and explanation of state applicable or relevant and appropriate requirements (ARARs);

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

- c. ~~e.~~ Site visits other than enforcement inspections;
- d. ~~d.~~ Technical Review Committee (TRC) or Restoration Advisory Board (RAB) participation;
- e. ~~e.~~ Administration of the Cooperative Agreement ~~Technical~~, technical review and comment on all documents and data regarding DoD prioritization of sites;
- f. ~~f.~~ Determination of scope and applicability of agreements [elaborate], excluding any litigation costs against the U.S. Government;
- g. ~~g.~~ Independent quality assurance/quality control samples.
- h. Any other services or costs associated with oversight of the Environmental Services which are not Regulatory Enforcement Activities.

### Section 227. Regulatory Enforcement Activities

~~—~~In accordance with 10 U.S.C. 2701(d)(3), regulatory enforcement costs are not allowable costs under this Agreement. The term ~~“~~“Regulatory Enforcement Activities~~”~~” includes:

- ~~—~~a. Activities associated with the City of San Francisco taking, or preparing to take, enforcement actions against third parties for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety or alleged violations of land use restrictions set forth in quitclaim deed(s) or in ~~covenants restricting the use of the land~~ a CRUP, as hereinafter defined, on the ACES; or
- ~~—~~b. Activities associated with USEPA, DTSC, the Water Board, ~~DPH~~CDPH, or other independent State or Federal regulatory agency with jurisdiction over the ACES taking, or preparing to take, enforcement actions against the ~~City~~SFRA, or its contractors or agents, for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety.

### Section 228. Grants Officer

~~—~~The Navy~~’s~~’s Grants Officer is the Director of Acquisition, NAVFACENGCOM, and is the only authorized Government official who can make changes and obligate funds under this Agreement.

### Section 229. Environmental Regulatory Agency or Agencies

~~—~~The term ~~“~~“Environmental Regulatory Agency or Agencies~~”~~” means the USEPA,

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~~the~~ DTSC, the Water Board, ~~and the~~ CDPH or other independent State or Federal regulatory agency with jurisdiction over the ACES.

### Section 230. Covenant to Restrict the Use of Property:

—The term “Covenant to Restrict the Use of Property” or “CRUP” means that certain document required by the CERCLA RODs that identifies the environmental covenants and restrictions that shall apply to the ACES. These environmental covenants and restrictions are necessary for the protection of human health and the environment and the implementation of final remedies for the ACES.

### Section 231. Amended Federal Facilities Agreement:

The term “Amended Federal Facilities Agreement” or “Amended FFA” means that certain document executed by the Navy, USEPA, DTSC, and the Water Board dated \_\_\_\_\_, ~~whereby the Parties amended the FFA executed on \_\_\_\_\_, whereby~~ the parties to the original Federal Facilities Agreement for the HPNS dated (“FFA”), amended such FFA.

### Section 232. Petroleum Corrective Action Plans

The term “Petroleum Corrective Action Plans” or “PCAPs” means the Petroleum Corrective Action Plan entered into among SFRA, the Water Board and DTSC effective concurrent with the Effective Date and addressing petroleum releases associated with the ACES that are not otherwise addressed within the CERCLA RODs.

## A r t i c l e   I I I OBLIGATIONS OF THE PARTIES

### Section 301. Obligations of the SFRA

a. —~~a.~~ In consideration of the Navy’s agreement to pay the SFRA for allowable costs in the amount specified in Section ~~302.302~~ below, ~~and in accordance with the~~ payment schedule set forth in Appendix 11, the terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations (“CFRs”), and the applicable Office of Management and Budget (“OMB”) Circulars, ~~for performing the Environmental Services,~~ the SFRA assumes responsibility for performing the Environmental Services ~~to address Known Conditions, Reasonably Expected Environmental Conditions, and Unknown Insured Conditions.~~ Subject to the provisions of Sections ~~302.302~~ hereof, the SFRA agrees that it shall cause to be performed the necessary Environmental Services even if the costs associated therewith exceed the funds provided by the Navy hereunder. The SFRA’s obligation to perform Environmental Services is expressly conditioned upon the Navy providing funding for performing the Environmental Services in accordance with Section ~~302.302~~ hereof.

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

However, to the extent that the Navy pays a portion of the funding set forth in Section ~~302.~~302 hereof, but fails to pay the full amount set forth in that Section, or in the event that the Agreement terminates pursuant to Section 1003 hereof, the SFRA's obligations shall be limited to only that portion of Environmental Services which have been performed by use of the funds actually provided by the Navy or the insurer as set forth in Section 712.B hereof. ~~These conditions~~Any dispute with respect to delineating the portion of the Environmental Services performed with the use of such partial funding shall be subject to dispute resolution pursuant to Section 1001 hereof. The SFRA shall make reasonable progress toward performing Environmental Services. ~~The SFRA shall conduct audits and shall provide performance and financial reports to the Navy in accordance with Section 301.c. below. The SFRA shall cause the performance of the Environmental Services in a manner that will not unreasonably delay the Navy's performance of its obligations under Section 302 hereof.~~

b. The SFRA shall conduct audits and shall provide performance and financial reports to the Navy in accordance with Section 301.e. below.

c. The SFRA shall cause the performance of the Environmental Services in a manner that will not unreasonably delay the Navy's performance of its obligations under Section 302 hereof with respect to the Navy-Retained Conditions.

d. ~~b.~~ The SFRA shall indemnify the Navy pursuant to the terms of Section ~~711.C hereof~~711.0 hereof, but only to the extent that such obligation arises from Environmental Services performed, and for which the Navy has provided funds.

e. ~~e.~~ Non-Federal Audits, Performance Reporting & Financial Reports.

(1) ~~(1)~~ The SFRA is responsible for obtaining annual audits in accordance with the Single Audit Act Amendments of 1996 (31 USC 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits. The costs of audits made in accordance with this section are allowable costs under this Agreement.

(2) ~~(2)~~ The SFRA is responsible for assuring compliance with applicable Federal requirements and that performance goals are being achieved. In accordance with 32 CFR 33.40, the SFRA shall submit annual performance reports to the Navy.

(3) ~~(3)~~ In accordance with 32 CFR 33.41, the SFRA shall submit annual financial status reports to the Navy.

~~d.f.~~ The SFRA shall provide the Navy notice within thirty (30) calendar days of receiving notice by Environmental Regulatory Agencies, or other third parties, of the existence



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

of any condition at the ACES that suggests that an action is necessary for which the SFRA is not responsible under this Agreement. If the SFRA is served with a complaint or written notice by an Environmental Regulatory Agency, the SFRA shall provide the Navy with a copy of such document no later than seven (7) calendar days following the service of such document.

~~eg.~~ Within thirty (30) calendar days of receiving actual notice of any condition at or affecting the ACES or that the SFRA discovers, for which the SFRA is not ~~responsible~~ under Section 302 hereof, the SFRA shall notify the Navy of such condition. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty-four (24) hours of any such discovery. The Parties shall, within ~~a reasonable period of time~~ five (5) business days after such notification, meet and confer regarding the terms on which the Navy may return to conduct any additional remedial action found to be necessary or provide funds to the SFRA in amounts sufficient to take any necessary actions required by CERCLA.

~~fh.~~ Notwithstanding the provisions of the preceding Section 301.e. hereof, but subject to the Navy's funding limitation as set forth in Section 401 hereof, the SFRA shall have the right, but not the duty, to take or cause to be taken the following actions within the ACES with respect to Navy-Retained Conditions:

(1) ~~(1)~~ Investigation Activities. Any activity necessary to determine the existence, nature, character and extent of conditions that may constitute Navy-Retained Conditions.

(2) ~~(2)~~ The SFRA shall notify the Navy within fifteen (15) business days ~~whenever~~ after the SFRA takes or causes to be taken any action under Section 301.f.(1) hereof. If the Navy disputes an SFRA action taken under Section ~~301.f.~~ 301.1(1), the Navy may initiate dispute resolution procedures under Section 1001 hereof.

~~gi.~~ If the SFRA discovers a condition in the ACES that the SFRA reasonably believes is a Navy-Retained Condition, the SFRA shall ~~seek to determine~~ make an initial determination whether such condition is in fact a Navy-Retained Condition before incurring such costs or obligations (other than such costs and obligations reasonably necessary to make such initial determination). ~~– If, despite using its best commercially reasonable efforts to avoid incurring such costs, the SFRA incurs costs or obligations with respect to a Navy-Retained Condition, the SFRA may seek reimbursement from the Navy, subject to the Navy's funding limitation as set forth in Section 401, hereof, and the dispute resolution provisions of Section 1001 hereof. Nothing in this Agreement shall be construed as authorizing the SFRA to seek reimbursement from the Navy for costs solely associated with the initial investigation needed to determine whether a newly discovered condition is properly categorized as a Known Condition, an Unknown Condition, or a Navy Retained Condition.~~

~~hj.~~ The SFRA shall provide to the Navy all information obtained or developed by

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

the SFRA with respect to any Navy-Retained Conditions that the SFRA discovers.

~~ik.~~ The SFRA shall obtain the Environmental Insurance Policies, and other insurance required, as described in Section 712, herein.

~~j.l.-~~ The SFRA shall conduct annual site inspections to ensure ~~that all institutional control objectives and land use restrictions are complied with by all~~ compliance with the Long Term Obligations by future transferees of the ACES and prepare compliance monitoring reports and certificates as ~~provided in the LUC RD~~ required by the CERCLA RODs. The SFRA shall notify and obtain approval from the Navy, which shall not be unreasonably withheld, of any ~~proposals for a~~ change in land use that is inconsistent with the use restrictions and assumptions contained in the CRUP or described in the CERCLA RODs. ~~The~~ After receiving approval from the Navy, the SFRA shall notify and obtain approval for such use from the other signatories to the Amended FFA. ~~Signatories after receiving approval from the Navy.~~

### Section 302. Obligations of the Navy

~~a.~~ a.  
The maximum funding obligation of the Navy to the SFRA for performing the Environmental Services during the term of this Agreement is \$ [TBD X] ~~for the SFRA to perform that portion of the Environmental Services relating to Parcel G, and \$ [TBD Y] for the SFRA to perform the remaining balance of the Environmental Services, for a total of \$ [TBD Z] for all of the Environmental Services, and shall be provided to the SFRA in (?) advance payments. The first payment to the SFRA shall be made within X (X) days after recordation of the deed conveying title to the Early Transfer Property from the Navy to the City. The Navy,~~ which shall be paid in installments, in accordance to the Payment Schedule set forth in Appendix 11. All payments by the Navy shall be made to , in their capacity as escrow agent ("Escrow Agent") pursuant to the Agreement. The Escrow Agent shall release funds to the SFRA in accordance with the escrow agreement set forth in Appendix 12 ("Escrow Agreement"). As set forth in the Payment Schedule, the first payment by the Navy shall be made to the Escrow Agent within days after approval of the early transfer by the Administrator of USEPA and concurrence by the Governor of California. The Navy's obligation to pay hereunder is subject to the availability of appropriated funds and ~~this payment schedule~~ the Payment Schedule shall not be interpreted to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. 1341). With respect to any payments other than the first payment, the Navy shall provide XX days notice to SFRA whether each subsequent payment will be made in accordance with the Payment schedule.

b. As set forth in the Escrow Agreement, the Navy shall deposit with the Escrow Agent a fully executed deed conveying title to the ACES from the Navy to the SFRA within days after approval of the early transfer by the Administrator of USEPA and concurrence by the Governor of California. The Escrow Agent shall record such deed and disburse Navy funds deposited with the Escrow Agent all as set forth in the Escrow Agreement.



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

c. ~~b.~~ Within ~~a reasonable time~~ thirty (30) calendar days after the SFRA has provided the Navy with:

~~(1) the~~ proper documentation establishing that Regulatory Closure has been obtained for the ACES, or portions of the ACES, as set forth in the AOC, and

~~(2) documentation of approval of "operating properly and successfully" demonstration as approved by the Administrator of EPA if necessary in accordance with 120(h)(3)(B), and~~

~~(3) (2)~~ a written request from the SFRA to issue the appropriate CERCLA warranty; for the ACES, or such portions of the ACES, the Navy shall issue to the SFRA the warranty required under CERCLA, Section 120(h)(3)(C)(iii). The SFRA shall bear the costs of preparing any new legal descriptions for the CERCLA warranty to be recorded.

d. ~~e.~~ Within ~~a reasonable period of time~~ thirty (30) calendar days after receiving any notice from the SFRA under Section 301.d. or 301.e. hereof, the Navy shall confer with the SFRA with regard to any Navy-Retained Condition at issue. ~~—~~ The exception to these terms is that the Navy shall confer with the SFRA within ~~a reasonable period of time~~ five (5) business days after receiving any notice concerning the presence of UXO, biological warfare agents, chemical warfare agents or Radiological Materials. The Navy and the SFRA, in consultation with the appropriate Environmental Regulatory Agency or Agencies, shall (i) endeavor to agree to any necessary actions to be taken by the Navy with respect to Navy-Retained Conditions, subject to the availability of funds, ~~Alternatively, the Parties shall or~~ (ii) attempt to agree on the funds to be provided by the Navy to the SFRA to enable the SFRA to take such actions as may be required by the appropriate Environmental Regulatory Agency or Agencies, subject to the availability of funds. If the Navy takes action(s) with respect to the Navy-Retained Conditions, it shall cause the performance of such action(s) in a manner that will not unreasonably delay the SFRA's performance of its obligations under Section 301 hereof. If the Parties cannot agree whether an environmental condition constitutes a Navy-Retained Condition, or disagree about the action required in response to any such condition under CERCLA, the matter may be submitted to dispute resolution under Section 1001. ~~—~~ Consistent with the provisions of above Section 301.f., the SFRA may take any actions deemed necessary, and seek reimbursement from the Navy for the costs associated with such actions.

e. ~~d.~~ Any Navy liability for the death of or injury to any person, or the loss of or damage to any property, caused by Navy use of the ACES shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended), or as otherwise provided by law.

f. [TRANSITION PLAN OBLGATIONS?]

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## Article IV FUNDING LIMITATION AND BUDGETING

### Section 401. ~~Navy's~~ Funding Limitation

The maximum Navy funding obligation for the Environmental Services to be performed by the SFRA under this Agreement is \$~~[TBD-X]~~\_\_\_\_\_. Except as may otherwise be provided in Section ~~302.e~~,302 above, the Navy will not pay any Environmental Service costs that exceed the amount described in Section 302.a. above. The Navy's obligation to pay any costs hereunder is subject to the availability of appropriated funds. Nothing in this ~~Agreement~~agreement shall be interpreted to establish obligations or require payments by the Navy in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. The SFRA incurs any additional costs, including any costs for services or activities determined to be defined as Ineligible Work, at its own risk. ~~Any statements in this Agreement regarding the SFRA's ability to seek reimbursement for any additional costs, or to negotiate any additional amounts to be paid, do not create a Navy obligation to pay such costs or amounts.~~

INSERT THE UIC AND LINE OF ACCOUNTING HERE

## Article V PAYMENT SCHEDULE

### Section 501. General

~~\_\_\_\_\_ The SFRA shall be paid in accordance with Section 302.a. above.~~

Subject to the Availability of funds, the Navy shall deposit funds with the Escrow Agent in accordance with the Payment Schedule set forth in Appendix 11 in compliance with the provisions of 32 CFR Part 33, OMB Circular A-87 and OMB Circular A-102. The Escrow Agent shall disburse funds to the SFRA in accordance with the Escrow Agreement set forth in Appendix 12.

### Section 502. Payments

\_\_\_\_\_a. The amount provided by the Navy to the Escrow Agent in accordance with Section 302.a. is an advance payment to the SFRA made in accordance with the advance payment requirements of 32 CFR §33.21(c), as follows:

\_\_\_\_\_ (1)-The SFRA shall maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transferreceipt of the funds by the Escrow Agent and their disbursement by or on behalf of the SFRA.

\_\_\_\_\_ (2) ~~Within ten (10) business days after receiving the payment~~

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 ~~from the Navy, the SFRA shall deposit all such funds with an independent third party payee such~~  
2 ~~as an escrow agent, title company, or insurer. Such independent third party payee~~(2) The  
3 Escrow Agent shall be responsible for making all payments to ~~the party or parties,~~  
4 ~~including~~ a subsequent transferee and/or environmental contractor(s), with whom the SFRA  
5 enters into an agreement to perform the Environmental Services or to supervise the performance  
6 of the Environmental Services. Funds shall be considered disbursed by the SFRA when the  
7 following has occurred:

8  
9 ~~(A).~~ (A). ~~\_\_\_\_\_~~ The ~~SFRA~~ Escrow Agent does not  
10 retain possession of the funds;

11  
12 ~~(B).~~ (B). ~~\_\_\_\_\_~~ The Escrow Agent or the SFRA  
13 cannot get the funds back upon demand (this does not include allowable costs incurred by  
14 the SFRA for which the SFRA requests proper reimbursement from the ~~independent third~~  
15 ~~party payee~~ Escrow Agent);

16 ~~\_\_\_\_\_~~ ~~(C).~~ ~~The independent third party payee is an independent stakeholder~~  
17 ~~for the SFRA and the party or parties with whom the SFRA enters into an agreement to supervise~~  
18 ~~the performance of the Environmental Services and not the agent of the SFRA;~~

19  
20 ~~(C).~~ (C). ~~\_\_\_\_\_~~ ~~(D).~~ The SFRA receives something in  
21 exchange for the transfer of funds ~~to~~ by the Escrow Agent to an independent third party payee,  
22 such as a contractual promise to hold the funds and make payments in accordance with specified  
23 procedures.

24  
25 ~~\_\_\_\_\_~~ ~~(3)~~ ~~Any agreement by the SFRA with an independent third~~  
26 ~~party payee must also~~ (3) The Escrow Agreement must include the above provisions ~~(A).~~  
27 ~~through (D).~~ and satisfy the requirements of 32 CFR §33.21(c).

28  
29 ~~\_\_\_\_\_~~ ~~(4)~~ (4) Interest. Any interest earned on the advance  
30 payment ~~by the SFRA~~ prior to the disbursement of those funds ~~to an independent third party~~  
31 ~~payee, as set forth in Section 502.a. above,~~ by the Escrow Agent in accordance with the Escrow  
32 Agreement above must be returned to the Navy in accordance with 32 CFR §33.21(h)(2)(i), or  
33 otherwise credited to the Navy for the purposes of this Agreement. However, any  
34 ~~interest~~ interests earned on those funds after disbursement ~~from the SFRA to the independent~~  
35 ~~third party payee~~ by the Escrow Agent are considered funds to be utilized for the purposes of this  
36 Agreement.

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## Article VI PAYMENT

### ~~Section 601. General~~ Section 601. RESERVED

~~After recordation of the deed conveying title to the ACES Property from the Navy to the SFRA, the Navy shall make the first payment to the SFRA [and subsequent payments within ....] as provided in this Agreement and in compliance with the provisions of 32 CFR Part 33, OMB Circular A-87 and OMB Circular A-102. [see escrow provision in 302.a.]~~

### Section 602. Relation to Prompt Payment Act.

~~—~~ This Agreement is not a contract as defined under OMB Circular A-125, which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.). Accordingly, the Navy is not liable to the SFRA for interest on any untimely payments under this Agreement.

### Section 603. Direct Navy Payment of SFRA Obligations

~~—~~ The Navy is not in privity with, and shall not directly pay any SFRA contractors, employees, vendors, or creditors for any costs incurred by the SFRA under this Agreement. The Navy assumes no liability for any of the SFRA's contractual obligations that may result from any SFRA performance of duties under this Agreement. The Navy assumes no liability hereunder for any SFRA contractual obligations to any third parties for any reason. ~~—~~ The SFRA hereby agrees to defend and hold the Navy harmless from any such liabilities.

## Article VII GENERAL PROVISIONS

### Section 701. Term of Agreement

~~—~~ Unless terminated under Section 1003 below, this Agreement shall remain in effect until Regulatory Closure within the ACES has been obtained. Only the following ~~three~~two terms of this Agreement shall survive such termination, and then only if the Agreement is not terminated as a result of the Navy's failure to provide the funds specified in Sections 302.A and 302.B above or other Navy default:

a. ~~a.~~ SFRA requirements to maintain compliance under the CERCLA RODs, PCAPs, and ~~CAPs~~, AOC and to comply with any applicable Long-Term Obligations;

b. ~~b.~~ the SFRA's and the Navy's obligations under Section 711 below (including the relevant provisions of Sections 101, 102, 301.A, 302, 703, 706, 707, and 801

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

cross-referenced in Section 711), and; (iii) Section 715.

### Section 702. Amendment of Agreement

Only a written instrument signed by the parties hereto may amend this Agreement.

### Section 703. Successors and Assigns

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

### Section 704. Entire Agreement

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement.

### Section 705. Severability

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

### Section 706. Waiver of Breach

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party, and no "course of conduct" shall be considered to be such a waiver, absent the waiver being documented in a mutually signed writing.

### Section 707. Notices

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

#### With Regard to the Navy:

Director, Base Realignment and Closure Management Office  
Department of the Navy  
1455 Frazee Road, Suite 900

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 San Diego, CA 92108

2

3 **With a copy to:**

4

5

6

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## With Regard to the SFRA:

[San Francisco Redevelopment Agency](#)  
[One South Van Ness Avenue](#)  
[Fifth Floor](#)  
[San Francisco, CA 94103](#)  
[Attn:](#)

## With a copy to:

[Celena Chen, Senior Attorney](#)  
[San Francisco Redevelopment Agency](#)  
[One South Van Ness Avenue](#)  
[Fifth Floor](#)  
[San Francisco, CA 94103](#)

## With a copy to:

[Elaine Warren, Assistant City Attorney](#)  
[Office of City Attorney](#)  
[City of San Francisco City Hall](#)  
[Room 234](#)  
[1 Dr. Carlton B. Goodlett Place](#)  
[San Francisco, CA 94102-4682](#)

## With a copy to:

[George R. Schlossberg, Esq.](#)  
[Kutak Rock LLP](#)  
[1101 Connecticut Avenue, N.W.](#)  
[Washington, D.C. 20036](#)

## Section 708. Conflict of Interest

—The SFRA shall ensure that its employees are prohibited from using their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others.

## Section 709. Access to and Retention of Records

—The SFRA shall afford any authorized representative of the Navy, DOD, the Comptroller General, or other Federal Government agency access and the right to examine all SFRA records, books, papers, and documents related to the SFRA's performance

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

under this Agreement and are otherwise required to be retained under the AOC. This includes all such records in automated forms ("Records") that are within the SFRA's custody or control, and that relate to its performance under this Agreement. This right of access excludes any attorney-client communications, attorney work product, or any other legally privileged documents. The SFRA shall retain required records intact in their original form, if not the original documents, or in another form if the Navy approves. Such approval shall not be unreasonably withheld. ~~SFRA record retention requirements shall extend for at least three (3) years following the completion or the termination of this Agreement. The SFRA shall allow the Navy access to the SFRA's records during normal business hours. The Navy will give the SFRA seventy-two (72) hours prior notice of its intention to examine the SFRA's records, unless the Navy determines that more immediate entry is required by special circumstances. Any such entry shall not give rise to any claim or cause of action against the Navy by the SFRA or any officer, agent, employee, or contractor thereof.~~

### Section 710. Change of Circumstances

~~Each Party will promptly notify the other Party of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such Party's ability to perform this Agreement.~~

### Section 711. Liability and Indemnity, Waiver and Release

~~a.~~ The SFRA's Obligations and Limited Waiver of Statutory Rights

~~(1)~~—In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, the SFRA agrees that it shall, upon receipt of the first total payment of the grant award, indemnify and hold the Navy harmless for any of the following, provided, however the SFRA's indemnification obligations under this subparagraph (1)(a) shall in no event apply to Navy-Retained Conditions or Uninsured Unknown Conditions:

~~(A) any response cost claims for Known and Reasonably Expected Environmental Conditions in the ACES, including hazardous substances, pollutants and contaminants, petroleum, and petroleum derivatives, but only to the extent that such response cost claims result from and are associated with Known Conditions; Reasonably Expected Environmental Conditions; or activities, actions, contaminants and wastes set forth above in the list of "or any "Ineligible Work" as set forth in Section 218 above. The SFRA's indemnification obligation under this subparagraph (1)(a) shall not apply to Navy-Retained Conditions and Unknown Conditions which are not subject to the environmental insurance policy or policies performed or caused to be performed by the SFRA;~~

(B) ~~(B)~~—oversight costs for any remedy implemented by the SFRA to the extent that the SFRA is required to install such remedy to



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 achieve Regulatory Closure under this Agreement;

2  
3 ~~(C)~~ ~~\_\_\_\_\_~~ ~~(C)~~ all claims for personal injury or  
4 property damage to the extent caused by the SFRA or its contractors in the course of performing  
5 the Environmental Services;

6  
7 ~~(D)~~ ~~\_\_\_\_\_~~ ~~(D)~~ all natural resource damage claims  
8 pursuant to 42 U.S.C. Section 9607(a)(4)(C) pertaining to releases of hazardous substances, but  
9 only to the extent that such damages were caused, or contributed to, by the negligent or wrongful  
10 actions of the SFRA, its contractors or its successors in interest;

11  
12 ~~(E)~~ ~~\_\_\_\_\_~~ ~~(E)~~ all costs arising from any  
13 ~~faulty~~negligent performance of the Environmental Services which SFRA performs or causes  
14 to be performed;

15  
16 ~~(F)~~ ~~\_\_\_\_\_~~ ~~(F)~~ all costs of additional remediation  
17 required on or within the ACES as a result of a change in land use from that upon which  
18 the initial remedial action selection decision was based when Regulatory Closure was  
19 completed;

20  
21 ~~(G)~~ ~~\_\_\_\_\_~~ ~~(G)~~ all costs associated with the  
22 correction of any failure of any Navy-selected remedy implemented by the SFRA, but only to the  
23 extent such costs are directly attributable to the poor workmanship or negligence of the SFRA or  
24 its contractors in the performance of said implementation;

25  
26 ~~(H)~~ ~~\_\_\_\_\_~~ ~~(H)~~ all costs arising from the correction  
27 of any failure of any remedy both selected and implemented by the SFRA; and

28  
29 ~~(I)~~ ~~\_\_\_\_\_~~ ~~(I)~~ all costs arising from or associated  
30 with claims addressed in the Waiver, Release and Covenant Not to Sue provisions set forth in  
31 Section 711.A(76) below.

32  
33 ~~(2)~~ ~~\_\_\_\_\_~~ ~~(2)~~ With regard to the ACES, the Parties agree that the  
34 SFRA has provided financial assurances reasonably acceptable by the Navy to meet the  
35 requirements of 42 U.S.C. Section 9620(h)(3)(C)(ii).

36  
37 ~~(3)~~ ~~\_\_\_\_\_~~ ~~(3)~~ Except as otherwise expressly provided by  
38 this Agreement, this Agreement shall not be construed to limit, expand or otherwise affect any  
39 right that the SFRA may have, in the absence of this Agreement, to take legal action to require  
40 the Navy to act with respect to Navy-Retained Conditions, or to seek damages  
41 resulting from the Navy's performance or failure to perform any actions with respect to  
42 Navy-Retained Conditions. - Except as otherwise expressly provided by this Agreement, this  
43 Agreement shall also not be construed to limit, expand or otherwise affect any right that the

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Navy may have, in the absence of this Agreement, to take legal action against the SFRA.

(4) ~~(4)~~ Nothing in this Section creates rights of any kind in any person or entity other than the Navy and the SFRA.

(5)

(6)

~~(5) The provisions of this Section shall be included in any deed or lease from the SFRA of all or any portion of the subject Property and shall be binding upon any successor in interest.~~

(7) ~~(6)~~ The SFRA and the Navy agree that the Environmental Services to be caused to be performed by the SFRA in accordance with the terms of this Agreement does not include any work relating to    nor is the SFRA responsible for indemnification of the Navy for any work related to    Navy-Retained Conditions.

(8)

(9) ~~(7) Waivers, Releases, and Covenants Not to Sue. In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, and as an administrative settlement of past, present, and future claims or causes of action ("claims"), the SFRA, upon receipt of payment, waives, releases, and covenants not to sue or otherwise pursue any cost, claim or liability against the Government relating to:~~

(10)

(11) ~~(A) Any cleanup, response or corrective action, property damage, or personal injury incurred by the SFRA associated with or as a result of Known Conditions; Reasonably Expected Environmental Conditions; Insured Unknown Conditions; or activities, actions, contaminants and wastes set forth above in the list of "Ineligible Work;" and~~

(12)

(13) ~~(B) Any consequential damages related to development delays caused by the Navy's performance of, or failure to perform, investigation or remediation activities with respect to Navy Retained Conditions; and~~

(14)

~~(C) Any cost of redeveloping, reconstructing, altering, repairing, or replacing any cap/cover or containment remedial action constructed pursuant to a CERCLA ROD, whether or not such activity is addressed in subsequent CERCLA RODs or PCAPs, a CERCLA ROD Amendment, an Explanation of Significant Differences ("ESD"), or through a review and approval process by the United States of America and/or State of California pursuant to a RMP or CERCLA IC review and approval procedure.~~

### Section 712. Liability and Insurance

      a. The SFRA shall either self-insure, or carry and maintain general

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

liability insurance, to afford protection with limits of liability in amounts not less than \$5,000,000.00 in the event of bodily injury or death to any number of persons in any one accident.

b. ~~b.~~ The SFRA agrees to bind subsequent to the execution of this Agreement, and with an effective date of conveyance, Environmental Insurance Policies with reasonably acceptable terms, conditions and coverages to the Navy which shall include both a Cleanup Cost Cap Policy ("Cost Cap Policy") for cost overruns associated with the performance of the Environmental Services and a Pollution Legal Liability Insurance Policy ("PLL Policy"), or similar coverages, and issued by an insurance carrier that is rated A.M. Best's ~~\_\_\_\_\_~~ or better, as substantially similar to the Environmental Insurance Policies shown in Appendix 4.- Such Policy or Policies will provide that the insurer waive its right of subrogation against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party any rights of action that the SFRA may have against the Navy under this Agreement, subject to the provisions of Section 711.above. The Navy shall be listed as an Additional Insured with respect to the coverage provided in any Environmental Insurance Policy or Policies. The Navy shall not otherwise be deemed an insured of, nor have any rights with respect to, any other grant of coverage under the Environmental Insurance Policies. [Availability of such Policy or Policies?]

c.

~~e.~~ **RESERVED.**

d. ~~d.~~ The SFRA will either self-insure or carry and maintain worker's compensation or similar insurance in the form and amounts required by law. If a worker's compensation or similar insurance policy is obtained, any such insurance policy will provide a waiver of subrogation of any claims against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party rights of action that the SFRA may have against the Navy.

e. ~~e.~~ General Liability Policy Provisions: All general liability insurance which the SFRA carries or maintains, or causes to be carried or maintained, under this Section 712 will be in such form, for such amounts, for such periods of time and with such insurers as the Navy may reasonably approve. Such Navy approval shall not be unreasonably withheld or delayed.- All policies issued for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after the Navy receives written notice thereof. Any such policy shall also provide a waiver of subrogation of any claims against the Navy, and its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to a third party any rights of action which the SFRA may have against the Navy. The Navy acknowledges and accepts the SFRA's self-insurance coverage for general liability, worker's compensation, or for any similar coverage.

f. ~~f.~~ Delivery of Policies: The SFRA will provide the Navy with a certificate of insurance or statement of self insurance evidencing the insurance required for

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

the SFRA. At least thirty (30) days before any such policy expires, the SFRA shall also deliver to the Navy a certificate of insurance evidencing each renewal policy covering the same risks.

### Section 713. Reports

—To assure that the Navy will receive from the SFRA the appropriate documentation necessary for the Navy to execute the CERCLA covenant, the Navy may request that the SFRA provide additional information concerning the environmental condition of the ACES reasonably necessary to enable the Navy to execute the CERCLA covenant. As soon as possible after any such request is made, if the SFRA can reasonably obtain and release such information, the SFRA shall provide the Navy access to any documents containing such requested information. In any event, the SFRA agrees to provide the Navy such access within ten (10) business days of the Navy's information request.

### Section 714. Officials Not to Benefit

—The SFRA acknowledges that no member or delegate to the United States Congress, or Resident Commissioner, shall be permitted to share in any part of this Agreement, or receive any benefit that may arise therefrom.

### Section 715. Representations

a. The Navy represents that:

(1) — ~~(1)~~ it is fully authorized to enter into this Agreement;

(2) — ~~(2)~~ the SFRA may rely on the data provided to the SFRA or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making any disclosures required under applicable law; and

(3) — ~~(3)~~ the information provided to the SFRA by the Navy hereunder fairly and accurately represents the Navy's actual knowledge of the nature and extent of contamination within the ACES.

b. To the extent (i) the data provided to the SFRA or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making any disclosures required under applicable law is not accurate, or (ii) the information provided to the SFRA by the Navy hereunder does not fairly and accurately represent the Navy's actual knowledge of the nature and extent of contamination within the ACES, and without limiting any other remedies SFRA may have under this Agreement or at law or equity, SFRA shall be entitled to recover from the Navy any resulting additional costs and expenses to the extent necessary to obtain Regulatory Closure, subject to the availability of funds.

c. The SFRA represents that:

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

(1) ~~(1)~~ it is a local reuse organization approved by the City in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended, and is fully authorized to enter into this Agreement; and,

(2) ~~(2)~~ it enters into this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act-, and,

~~(3)~~ any provision of this Agreement that states or implies that the Navy will reimburse the SFRA for any costs incurred, or that the Navy will perform any actions with respect to Navy ~~Retained Conditions~~, are wholly subject to the Anti-Deficiency Act.

### Section 716. Excess Funds

~~Funds~~, as provided for in Section 401 and Section 502 above, are only to be expended for the purposes for which they were provided for under the terms of this Agreement. In accordance with the procedures outlined in 32 CFR 33.50, any funds paid to the SFRA that remain unencumbered for allowable costs, after all regulatory approvals have been obtained and the CERCLA warranty has been issued by the Navy, are funds which may be determined to be excess by the Navy and not authorized to be retained by the SFRA and upon written demand by the Navy, the SFRA must immediately refund to the Navy those excess funds.

### ~~Section 717. Conveyance of IR Sites 7/18~~

~~a. With regard to the conveyance of IR sites 7/18 within Parcel B to the SFRA, the SFRA agrees to accept fee title to such portion of Parcel B following the completion of all of conditions set forth in Appendix "5."~~

~~b. To insure SFRA acceptance of fee title to such portion of Parcel B following the completion of all of conditions set forth in Appendix "5," the SFRA shall immediately execute an acceptance in the form set forth as Appendix "6" ("SFRA Acceptance"), of a Navy deed to such portions of Parcel B in the form set forth as Appendix "7" ("Navy Deed"), and deposit such SFRA Acceptance with an escrow agent mutually acceptable to the SFRA and the Navy. Pursuant to specific escrow instructions in the form set forth as Appendix "8" ("Escrow Instructions"), the Escrow Agent may record the Navy Deed and the SFRA Acceptance in accordance with the Escrow Instructions following the completion of all of conditions set forth in Appendix "5."~~

## Article VIII APPLICABLE LAWS AND REGULATIONS

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## Section 801. Applicable Law

— This Agreement is entered into incident to the implementation of a Federal program. Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed exclusively by, and be construed only in accordance with Federal law.

## Section 802. Governing Regulations

— This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the following authorities: DoD Directive 3210.6; the Uniform Administrative Requirements for Grants and Cooperative Agreements; other applicable portions of Title 32 of the Code of Federal Regulations, and pertinent OMB Circulars. If the provisions of this Agreement conflict with any such authorities, those authorities will govern.

## Section 803. Environmental Protection

— Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.

# Article IX PROCUREMENT

## Section 901. SFRA Contracts

— The SFRA's acquisition of goods and services to perform this Agreement will comply with the instructions and procedures contained in 32 CFR Section 33.36(b)(1) through (12). The SFRA must not contract with any party that is debarred, suspended, or otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension," and applicable DOD regulations thereunder.

## Section 902. Preference for Local Residents

a. Preference is allowed in entering into contracts with private entities for services to be performed at a military installation that is affected by closure or alignment under a base closure law. The Secretary of Defense may give preference, consistent with Federal, State, and local laws and regulations, to entities that plan to hire, to the maximum extent practicable, residents of the vicinity of such military installation to perform such contracts. — Contracts for which the preference may be given include contracts to carry out environmental restoration activities or construction work at such military installations. Any

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 such preference may be given for a contract only if the services to be performed under the  
2 contract at the military installation concerned can be carried out in a manner that is consistent  
3 with all other actions at the installation that the Secretary is legally required to undertake.

4  
5 ~~\_\_\_\_\_~~b. Definition.- In this section, the term ~~“~~"base closure law~~”~~" means the  
6 following:

7  
8 (1) ~~\_\_\_\_\_~~~~(1)~~ The provisions of title II of the Defense  
9 Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10  
10 U.S.C. 2687 note).

11  
12 (2) ~~\_\_\_\_\_~~~~(2)~~ The Defense Base Closure and Realignment Act of  
13 1990, as amended (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

14  
15 ~~\_\_\_\_\_~~c. Applicability - Any preference given under subsection (a) shall apply only  
16 to contracts entered into after the base closure law was enacted.



# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## Article X TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION

### Section 1001. Dispute Resolution

a. ~~a.~~ Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any Party with respect to disputes and the enforcement of any terms of this Agreement.

b. ~~b.~~ A dispute shall be considered to have arisen when one Party sends the other Party written notice of such dispute. Such written notice will include, to the extent available, all of the following information: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief, and; any documents or other evidence pertinent to the claim.

c. ~~c.~~ If a dispute arises under this Agreement, the Parties agree to attempt to resolve the dispute at the staff level. The Parties shall confer at the staff level within fifteen (15) days after a notice of dispute is received. Should staff-level discussions not resolve the dispute within such fifteen (15) day period (or longer, if agreed to by the Parties), the Parties agree to elevate the dispute to designated mid-level management. Mid-level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. ~~If Mid-level management cannot timely resolve the dispute, the Parties agree to then raise the issue with their respective senior-level management. Senior-level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. Each Party shall have the discretion to determine the person(s) to represent it at any meeting convened under this section.~~

d. ~~d.~~ If the dispute cannot be resolved after exhausting the remedies under Section 1001c. above, the dispute shall be appealed to the Director of the Base Realignment and Closure Office at the address indicated in Section 707 above. Such appeal must be written, and contain all of the documentation and arguments necessary for a decision. The Director shall render a decision in a timely manner. If the SFRA disagrees with the Director's decision, the SFRA may, by providing notice to the other Party, pursue whatever remedies that the SFRA may have available at law or in equity.

e. ~~e.~~ To the extent that there is a conflict between the Dispute Resolution provisions or process set forth herein and any dispute resolution provisions or process contained in the ~~Federal Facility Agreement applicable to Hunters Point Naval Shipyard (FFA)~~ Amended FFA, the dispute resolution provisions and process of the Amended FFA shall control.

### Section 1002. Enforcement



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

-Either party may enforce this Agreement according to its terms. Without limiting either party's enforcement rights, the Navy's enforcement rights for material breach by the SFRA, in accordance with the terms of 32 CFR Section 33.43, Enforcement, shall include:

a. ~~a.~~ Temporarily withholding cash payments pending correction of the deficiency by the SFRA or Sub-grantee or more severe enforcement action by the awarding agency;

b. ~~b.~~ Disallowing (denying both use of funds and matching credit for) all or part of the cost of the activity or action that is not in compliance;

c. ~~c.~~ Wholly or partly suspending or terminating the current award for the SFRA's or the Sub-grantee's program. - Any award termination will be conducted under Section 1003 below.

d. ~~d.~~ Withholding further awards under this Agreement; and

e. ~~e.~~ Taking other remedies that may be legally available.

### Section 1003. Termination

a. ~~a.~~ This Agreement may terminate by its own terms under Section 701 above, or by a party under this Section 1003.

b.

c. ~~b.~~ ~~Reserved~~

d. ~~c.~~ Reserved.

e. Reserved.

f. ~~d.~~ If a Party materially breaches this Agreement, the non-breaching party, to preserve its right to terminate, must provide the breaching party with a notice of intent to terminate. The breaching party shall have thirty (30) days to cure the breach, unless a longer period is agreed upon, in writing, by the parties. If the breaching party fails to cure the breach within the thirty (30) day (or longer, if agreed upon) period, then the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined under the dispute resolution procedures specified in Section 1001 above. Notwithstanding anything to the contrary in this Section 1003.d, the breaching party shall have ten (10) days to cure a breach that arises from any failure to make a required payment under this Agreement.

g. ~~e.~~ If this Agreement is terminated for reasons other than those set forth in

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Section 701 above, the SFRA shall immediately:

- (1) ~~(1)~~ Stop work;
- (2) ~~(2)~~ Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities;
- (3) ~~(3)~~ Terminate all subcontracts;
- (4) ~~(4)~~ With approval or ratification to the extent required by the Navy, settle all outstanding liabilities and termination settlement proposals arising from the termination of any subcontracts; any such approval or ratification will be final;
- (5) ~~(5)~~ Take any action that may be necessary to protect human health or the environment against imminent and substantial endangerment thereto, or to protect and preserve any Navy-owned property at the ACES, as the Grant Officer may direct; and
- (6) ~~(6)~~ Return or cause to be returned to the Navy ~~the~~any funds held by the SFRA or the Escrow Agent not otherwise committed for allowable costs of payment for ~~work or services~~Environmental Services performed in accordance with ~~the purposes of~~ this Agreement.

~~\_\_\_\_\_~~ The SFRA agrees to insert such provisions in its contracts, and to require that such provisions be placed in any subsequent subcontracts between the SFRA's contractors and their subcontractors, so as to effect the provisions above.

~~\_\_\_\_\_~~ f. If this Agreement is terminated under this Section 1003, the status of the parties with respect to environmental conditions at the ACES shall revert to as the status that existed immediately preceding the effective date of this Agreement.

~~\_\_\_\_\_~~ g. A party's right to terminate, and any determination of funds available for reimbursement, under this Section 1003 shall be subject to the dispute resolution procedures in Section 1001 above.

### Section 1004. Effects of Suspension and Termination

~~\_\_\_\_\_~~ a. Except for allowable costs in accordance with ~~32~~ 33.22 CFR Section 33.22 and the applicable OMB Circulars, any costs to the SFRA resulting from obligations incurred by the SFRA during a suspension, or after termination of payments, are not allowable unless the Navy expressly authorizes them in the notice of suspension or termination, or subsequently authorizes such costs. Any other SFRA costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable only if:

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

(1) ~~(1)~~ the costs result from obligations which were properly incurred by the SFRA before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and

(2) ~~(2)~~ the costs would be allowable if the Agreement were not otherwise suspended or expired at the end of the funding period in which the termination takes effect.

~~b.~~ The enforcement remedies specified in this section do not relieve the SFRA or its subcontractors from compliance with 32 CFR Section 33.35, Subpart C, or 32 CFR Part 25, including the restrictions on entering into a covered transaction with any party which is debarred, suspended, or is otherwise excluded from, or ineligible for participation in, Federal assistance programs under Executive Order 12549, "Debarment and Suspension.""

### Article XI LEGAL AUTHORITY

#### Section 1101. Legal Authority

~~The~~ The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party's abilities to perform its duties under this Agreement.

~~IN WITNESS WHEREOF,~~ and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

#### SAN FRANCISCO REDEVELOPMENT AGENCY

By: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: Director

Dated: \_\_\_\_\_

#### THE UNITED STATES OF AMERICA

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

By: \_\_\_\_\_  
\_\_\_\_\_ Mr. Robert Griffin  
\_\_\_\_\_ Assistant Commander for Acquisition, Naval Facilities  
Engineering Command

Dated: \_\_\_\_\_

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## APPENDIX 13

Agreement to Implement the Conveyance Agreement  
between the United States of America and the San Francisco Redevelopment Agency  
for the conveyance of Hunters Point Naval Shipyard  
with Regard to IR Sites 7/18 and the Radiation-Impacted Area around Building 140  
dated

[Separate agreement to implement plan for IR Sites 7/18 and the  
Radiation-Impacted Area around Building 140 that utilizes escrow agent  
and mimics former ETCA section 717]

Document comparison done by DeltaView on Wednesday, September 09, 2009  
12:04:00 AM

Input:	
Document 1	c:\NetDocs\SFRA NAVY Clean ETCA 2 5 2009.doc
Document 2	c:\NetDocs\SFRA ETCA 9 8 09.doc
Rendering set	Kutak Option 1

Legend:	
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Format change	
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Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
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Deletions	738
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	1220